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V. 2422 see
No. 10946
V. 2421

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the
ESTATE OF NAT ROGAN, Collector of Internal
Revenue for the Sixth District of California, Deceased,
Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last
Will and Testament of PETER FERRY, Deceased,
Appellee.

TRANSCRIPT OF RECORD

(In Three Volumes)

VOLUME III

BOOK OF EXHIBITS

(Pages 771 to 1040, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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JAN 4

PAUL P. C.

No. 10946

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[PLAINTIFF'S EXHIBIT NO. 41]

DISTRIBUTION OF INCOME TO PETER L.
FERRY & CATHERINE B. FERRY OF
INCOME FROM TRUST #2012
CITIZENS NATIONAL TRUST & SAVINGS BANK

<u>Date</u>	<u>Amount</u>
Apr. 9, 1925 to Dec. 31, 1925	\$ 552.34
Year 1926	1,042.00
Year 1927	822.50
Year 1928	880.00
Year 1929	719.43
Year 1930	834.28
Year 1931	1,574.91
Year 1932	1,497.72
Year 1933	1,334.51
Year 1934	1,565.97
Jan. 1, 1935 to June 16, 1935	652.20
	<hr/>
Total	\$11,475.86

The above checks payable to Peter L. Ferry and Catherine Ferry.

\$11,281.99 stipulated to be correct amt. and not \$11,475.86 as stated above.

J. F. T. O'CONNOR
Judge

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Plf.
Exhibit No. 41 in evid. Filed 6/3, 1943 By Cross,
Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 42]

DISTRIBUTION OF INCOME OF TRUST #1080
OF TITLE GUARANTEE AND TRUST
COMPANY

<u>Date</u>	<u>Amount</u>
Mar. 4, 1931	\$ 722.93
Nov. 4, 1931	180.00
Nov. 23, 1931	260.00
July 15, 1932	30.45
Oct. 15, 1932	525.00
Nov. 1, 1933	500.00
	<hr/>
Total	\$2,218.38

Stipulated:

The checks for about amts. were made payable to Peter L. Ferry.

JFT

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Plf.
Exhibit No. 42 in evid. Filed 6/3-1943. By Cross,
Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 43]

SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES
TRUST S-5869

1925		September 8	80.09
August 19	\$ 76.86	October 10	80.09
September 11	77.74	November 9	80.09
October 10	75.71	December 12	80.09
November 10	76.20	1928	
December 10	67.12	January 11	80.09
1926		February 8	80.09
January 11	77.04	March 10	80.09
March 18	79.42	April 10	80.09
April 12	30.72	May 10	80.09
May 10	45.37	June 11	80.09
June 10	39.26	July 10	80.09
July 8	40.94	August 11	80.09
August 10	80.09	September 11	80.09
September 8	80.09	October 11	80.09
October 8	80.09	November 9	80.09
November 10	80.09	December 10	80.09
December 10	80.09	1929	
1927		January 11	80.09
January 7	80.09	February 9	80.09
February 10	80.09	March 11	80.09
March 8	80.09	April 10	71.19
April 11	80.09	May 10	71.19
May 10	80.09	June 11	71.19
June 10	80.09	July 10	71.19
July 9	80.09	August 10	71.19
August 17	80.09	September 10	71.19

(Plaintiff's Exhibit No. 43)

October 11	71.19	1932	
November 9	71.19	January 12	80.09
December 10	71.19	February 10	80.09
1930		March 11	80.09
January 10	71.19	April 12	51.86
February 10	71.19	May 11	35.55
March 11	71.19	June 10	80.09
1930—Cont'd.		July 12	80.09
April 10	\$ 71.19	August 10	80.09
May 12	71.19	September 10	69.88
June 11	71.19	October 10	4.59
July 11	71.19	November 10	24.00
August 8	71.19	December 10	75.00
September 10	71.19	1933	
October 10	71.19	January 11	80.00
November 10	71.19	February 10	75.00
December 10	71.19	March 15	50.00
1931		April 10	16.00
January 12	71.19	May 11	50.00
February 11	44.92	June 10	70.00
March 9	71.19	July 11	80.00
April 11	80.09	August 11	65.00
May 11	80.09	September 11	35.00
June 10	80.09	November 10	75.00
July 10	80.09	December 11	80.00
August 11	80.09	1934	
September 10	80.09	January 11	55.00
October 13	80.09	February 10	50.00
November 12	80.09	March 10	44.00
December 11	80.09	May 10	30.00
		June 9	85.00
		July 11	62.00

(Plaintiff's Exhibit No. 43)

August 10	25.00	1935	
September 11	25.00	January 11	23.00
October 11	40.00	February 13	28.00
November 10	25.00	March 9	45.00
December 11	80.00	April 11	30.00
		May 10	30.00
		June 10	80.00
Total for Catherine Ferry			\$7,826.78

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Ptf.
Exhibit No. 43 in evid. Filed 6/3, 1943. By Cross,
Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 44]

DISTRIBUTION OF PORTION OF INCOME OF
TRUST #4358—SECURITY FIRST NATIONAL
BANK

<u>Date</u>	<u>Amount</u>	<u>To Whom Check Payable</u>			
1926					
January 22	\$535.00	Peter L. Ferry & Catherine B. Ferry			
February 1	535.00	"	"	"	"
March 1	535.00	"	"	"	"
April 1	535.00	"	"	"	"
May 1	535.00	"	"	"	"
June 1	535.00	"	"	"	"
July 1	535.00	"	"	"	"
August 2	535.00	"	"	"	"
September 1	535.00	"	"	"	"
October 1	535.00	"	"	"	"
November 1	535.00	"	"	"	"
December 1	535.00	"	"	"	"
1927					
January 3	535.00	"	"	"	"
February 1	535.00	"	"	"	"
March 1	535.00	"	"	"	"
April 1	535.00	"	"	"	"
May 2	535.00	"	"	"	"
June 1	535.00	"	"	"	"
July 1	535.00	"	"	"	"
August 1	535.00	"	"	"	"
September 1	535.00	"	"	"	"
October 1	535.00	"	"	"	"
October 31	535.00	"	"	"	"
November 30	535.00	"	"	"	"
December 30	535.00	"	"	"	"

(Plaintiff's Exhibit No. 44)

1928

January 31	535.00	"	"	"	"
February 29	535.00	"	"	"	"
March 31	535.00	"	"	"	"
April 30	535.00	"	"	"	"
May 31	535.00	"	"	"	"
June 27	535.00	"	"	"	"
July 31	535.00	"	"	"	"
August 31	535.00	"	"	"	"
September 29	535.00	"	"	"	"
October 30	535.00	"	"	"	"

1929

January 1	535.00	"	"	"	"
January 8	246.51	"	"	"	"
February 4	535.00	"	"	"	"
February 27	535.00	"	"	"	"
March 30	535.00	"	"	"	"
April 30	535.00	"	"	"	"
May 31	535.00	"	"	"	"
June 28	535.00	"	"	"	"
July 31	535.00	"	"	"	"
August 29	535.00	"	"	"	"
September 30	535.00	"	"	"	"
October 31	535.00	"	"	"	"
November 30	535.00	"	"	"	"

1930

January 2	535.00	"	"	"	"
January 8	313.29	"	"	"	"

(Plaintiff's Exhibit No. 44)

<u>Date</u>	<u>Amount</u>	<u>To Whom Check Payable</u>			
1930—Cont'd.					
January 27	\$535.00	Peter L. Ferry & Catherine B. Ferry			
February 28	535.00	"	"	"	"
March 29	535.00	"	"	"	"
April 30	535.00	"	"	"	"
May 31	535.00	"	"	"	"
July 1	535.00	"	"	"	"
July 31	475.55	"	"	"	"
August 30	475.55	"	"	"	"
October 1	535.00	"	"	"	"
October 30	535.00	"	"	"	"
December 1	535.00	"	"	"	"
1931					
January 2	535.00	"	"	"	"
January 15	209.68	"	"	"	"
February 2	535.00	"	"	"	"
March 2	535.00	"	"	"	"
April 1	535.00	"	"	"	"
May 1	535.00	"	"	"	"
June 1	535.00	"	"	"	"
July 1	535.00	"	"	"	"
August 1	535.00	"	"	"	"
August 31	535.00	"	"	"	"
October 1	535.00	"	"	"	"
October 31	535.00	"	"	"	"
November 30	535.00	"	"	"	"
December 30	535.00	"	"	"	"

(Plaintiff's Exhibit No. 44)

1932

January 2	201.89	"	"	"	"
January 28	535.00	"	"	"	"
February 29	535.00	"	"	"	"
March 31	535.00	"	"	"	"
April 29	535.00	"	"	"	"
May 31	535.00	"	"	"	"
June 29	535.00	"	"	"	"
July 29	535.02	"	"	"	"
August 31	535.02	"	"	"	"
September 30	535.02	"	"	"	"
November 30	535.02	"	"	"	"
December 29	535.02	"	"	"	"

1933

January 30	535.02	"	"	"	"
March 1	63.00	Catherine B. Ferry			
March 30	63.00	"	"		
April 29	44.00	"	"		
June 1	60.00	"	"		
June 30	14.00	"	"		
July 29	30.00	"	"		
August 31	21.00	"	"		
September 30	63.00	"	"		
October 30	63.00	"	"		
November 29	63.00	"	"		
December 29	63.00	"	"		

1934

January 30	63.00	"	"
February 28	63.00	"	"
March 30	63.00	"	"
April 27	63.00	"	"

(Plaintiff's Exhibit No. 44)

<u>Date</u>	<u>Amount</u>	<u>To Whom Check Payable</u>	
1934—Cont'd.			
May 29	\$ 63.00	Catherine B. Ferry	
June 29	63.00	"	"
July 27	63.00	"	"
August 30	63.00	"	"
September 28	63.00	"	"
November 1	45.00	"	"
December 1	63.00	"	"
December 31	43.00	"	"
1935			
January 30	56.00	"	"
February 27	50.00	"	"
March 29	45.00	"	"
May 1	20.00	"	"
May 29	63.00	"	"
<hr/>			
Total payable solely to Catherine B. Ferry		\$ 1,562.00	
<hr/>			
Total payable to Peter L. Ferry & Catherine B. Ferry		\$46,327.43	

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Plf.
Exhibit No. 44 in evid. Filed 6/3-1943. By Cross,
Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 45]

IT:R

[Crest]

Office of

Internal Revenue Agent in Charge

TREASURY DEPARTMENT

Internal Revenue Service

Los Angeles, California.

Peter L. Ferry,
3030 Chevy Chase Drive,
Glendale, California,

In re: Income Tax

Date of Report: 8 Nov 1930

Years Examined: 1928.

Sir:

Inclosed herewith you will find copy of report covering examination recently made by a representative of this office, concerning your income tax liability, which is furnished for your information and files. The original of this report has been forwarded for final action to the Commissioner of Internal Revenue at Washington, D. C.

No remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your District. Interest is payable on deficiencies found due as set forth on the inclosed Form 882.

Kindly acknowledge receipt of the inclosed report to the undersigned by return mail.

Respectfully,

Alf Oftedal

Internal Revenue Agent in Charge.

Inclosures:

PY

(Plaintiff's Exhibit No. 45)

-1-

Examining Officer
Vernon C. Harp

Name Peter L. Ferry,
3030 Chevy Chase Drive,
Glendale, California.

STATEMENT OF TOTAL TAX LIABILITY

Year	Tax Previously Assessed	Adjustments Proposed in Accompanying Report		Correct Tax Liability
		Deficiency	Overassessment	
1928	\$2005.19	\$5.86	\$.....	\$2,011.05
Totals.....		.....	.....	.....

Note

The amount shown in the first column of the above statement is the amount assessed on the original return except as indicated in the following summary of adjustments previously made:

Year 19

Original tax _____

Deficiency assessed, 19 , _____

or

Overassessment scheduled....., 19 , _____

Net tax previously assessed..... =====

Year 19

(Plaintiff's Exhibit No. 45)

-2-

Peter L. Ferry

PRELIMINARY STATEMENT

Summary

<u>Year</u>	<u>Deficiency</u>
1928	\$5.86

The above stated deficiency results largely from the omission of taxable income from Trust No. 5819. Other adjustments are made in net income from business and deduction of contributions.

Taxpayer had six children under 18 years of age and was the sole support of his wife's father and mother.

Changes were discussed with taxpayer who offers no objections and waiver form 870 is submitted.

-3-

Peter L. Ferry

SCHEDULE NO. 1

Block Adjustments

Year 1928

	Husband's Return	Wife's Return	Changes	Husband's corrected	Wife's Corrected
2 Business	12,559.01		(1,681.05)	10,877.96	
3 Interest	3,434.30	3,434.30		3,434.30	3,434.30
4 Trusts	6,722.74	6,722.74	2,326.65	7,886.07	7,886.06
5 Rents	4,293.34	5,471.34		4,882.34	4,882.34
6 Profit Sales	6,846.33	6,846.33		6,846.33	6,846.33
TOTAL	33,855.72	22,474.71	645.60	33,927.00	23,049.03
15 Contributions error in footing	2,797.34 (10.00)		301.44 (10.00)	2,495.90	
TOTAL INCOME	31,068.38	22,474.71	937.04	31,431.10	23,049.03

(Plaintiff's Exhibit No. 45)

SCHEDULE NO. 1-A

Explanation of Items

Item 2. Net income from business.

	Return	Changes	Revised
Sales	258,740.13	(a) 54,900.00	203,840.13
Less Labor	45,042.25		45,042.25
Purchases	191,837.59	(b) 49,969.63	141,867.96
Eqpt. Inventory	4,640.64	(c) 4,640.64	
Depreciation	4,640.64	(d) (1,411.32)	6,051.96
Total	246,161.12	53,198.95	192,962.17
Net Income	12,579.01	1,701.05	10,877.96

-4-

Peter L. Ferry

Schedule No. 1-A (cont.)

Net Income	\$12,579.01	\$1,701.05	\$10,877.96
Error on Return	20.00		

(a) Receipts from borrowed money.

(b) Items included in purchases as follows:

Land Investment	\$ 5,500.00
Improvement Assessments	4,069.84
Note payments & money transfers	37,095.63
School tuitions	1,804.16
Church Donations	1,500.00

Total	\$49,969.63
-------	-------------

(Plaintiff's Exhibit No. 45)

(c) Decrease in equipment inventory also deducted as depreciation.

(d) Depreciation of contractors equipment allowed as follows:

Table of Depreciation

Balance	12/31/27	\$60,041.38
		<hr/>
"	12/31/28	60,041.38
Deduct Bal.	12/31/23	29,781.60
		<hr/>
Balance	12/31/28	\$30,259.78

Depreciation at 20% \$ 6,051.96

No equipment has been purchased since year 1926 and deduction is allowed at rate used in computation of prior years allowance.

Item 3. Interest income was accurately reported.

Item 4. Income from trusts.

A.	#4358	\$ 2,439.88
B.	#2012	5,126.35
C.	#5869	2,126.24
D.	#1052	3,753.01
E.	#5819	2,326.65
		<hr/>
Total		\$15,772.13

(Plaintiff's Exhibit No. 45)

-5-

Peter L. Ferry

Schedule No. 1-A (cont.)

One-half to each husband and wife \$7,886.07.
Income from items "A" to "D" inclusive consist of interest and amounts were accurately reported. Income from item "E" represents the distributive income as indicated in R.A.R. O.A. Danielson, dated 7-23-1930. No cash distribution was made and taxpayer omitted to report the accrued income.

Item 5. Rental income was accurately reported. Depreciation is allowable as computed at 4% but deductible in amount of one-half to each husband and wife.

Item 6. Profit of \$13,692.66 was accurately reported as indicated in partnership return of Glendale Airport Association examined by Agent Calkins on Sept. 11, 1930.

Item 15. Contributions are allowed as follows:

Glendale Community Chest	\$ 135.00
Rev. Father Howard Bldg. Fund	1,500.00
Church Contributions	860.90
Total	<hr/> 2,495.90

Contributions were disbursed out of business income and deductible by husband.

(Plaintiff's Exhibit No. 45)

-6-

Peter L. Ferry

SCHEDULE NO. 2

Computation of Tax

	Year 1928.
Net income (from schedule 1)	\$31,431.10
	<hr/>
Income subject to surtax	\$31,431.10
Less: Personal exemption and credit for dependents	6,700.00
	<hr/>
Balance subject to normal tax	\$24,731.10
Normal tax at	
1½% on \$ 4,000.00	60.00
3% 4,000.00	120.00
5% 16,731.10	836.56
Surtax on 31,431.10	994.49
	<hr/>
Total Tax	\$ 2,011.05
Tax previously assessed	2,005.19
	<hr/>
Additional tax to be assessed	\$ 5.86
	<hr/> <hr/> <hr/>

(Plaintiff's Exhibit No. 45)

Nov. 13, 1930

Mr. Peter L. Ferry,
3030 Chevy Chase Dr
Glendale, Calif.

Nov. 510161—1930 L

This office has received from the Internal Revenue Agent in Charge, together with the related documents, your agreement consenting to the immediate assessment of an income tax deficiency for the year or years 1928, amounting to \$5.86.

Interest from the date the tax should have been paid if the return or returns had been correctly prepared is accruing on the deficiency at the rate of one-half of 1% per month. If the deficiency is paid immediately, the interest will run to the date of payment. Otherwise, the interest will run to date of assessment or to thirty days after the filing of your waiver, whichever is earlier. Interest computed up to 10/27/30 amounts to \$.57 on or before 10/24/30.

It is requested that you return the inclosed copy of this letter with your remittance covering both the tax and interest at your earliest convenience, using the franked envelope which requires no postage; otherwise the amount of the additional tax, together with a greater amount of interest, will be included in a formal notice and demand which will be sent you as soon as the items can be listed for assessment.

(Plaintiff's Exhibit No. 45)

Deficiency Tax	5.86
“ Int	.57
	<hr/>
	6.43

Respectfully,

Galen H. Welch,
Collector,

By E M Cohee KT
E. M. Cohee,
Chief Office Deputy.

#233 ,

Nov. 13, 1930

Mrs. Peter L. Ferry,
3030 Chevy Chase Dr
Glendale, Calif.

Nov. 510160—1930 L

This office has received from the Internal Revenue Agent in Charge, together with the related documents, your agreement consenting to the immediate assessment of an income tax deficiency for the year or years 1928, amounting to \$96.43.

Interest from the date the tax should have been paid if the return or returns had been correctly prepared is accruing on the deficiency at the rate of one-half of 1% per month. If the deficiency is paid immediately, the

(Plaintiff's Exhibit No. 45)

interest will run to the date of payment. Otherwise, the interest will run to date of assessment or to thirty days after the filing of your waiver, whichever is earlier. Interest computed up to 10/27/30 amounts to \$9.35 on or before 11/24/30.

It is requested that you return the inclosed copy of this letter with your remittance covering both the tax and interest at your earliest convenience, using the franked envelope which requires no postage; otherwise the amount of the additional tax, together with a greater amount of interest, will be included in a formal notice and demand which will be sent you as soon as the items can be listed for assessment.

Deficiency Tax	96.43
“ Int	9.35
	<hr/>
	105.78

Respectfully,

Galen H. Welch,
Collector,

By E M Cohee KT

E. M. Cohee,

Chief Office Deputy.

(Plaintiff's Exhibit No. 45)

IT:R

[Crest]

Office of

Internal Revenue Agent in Charge

TREASURY DEPARTMENT

Internal Revenue Service

Los Angeles, California.

Mrs. Peter L. Ferry,
3030 Chevy Chase Drive,
Glendale, California.

In re: Income Tax

Date of Report: 8 Nov 1930

Years Examined: 1928.

Madam:

Inclosed herewith you will find copy of report covering examination recently made by a representative of this office, concerning your income tax liability, which is furnished for your information and files. The original of this report has been forwarded for final action to the Commissioner of Internal Revenue at Washington, D. C.

No remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your District. Interest is payable on deficiencies found due as set forth on the inclosed Form 882.

Kindly acknowledge receipt of the inclosed report to the undersigned by return mail.

Respectfully,

Inclosures:

Alf Oftedal

Internal Revenue Agent in Charge.

PY

Make check

(Plaintiff's Exhibit No. 45)

-1-

Examining Officer
Vernon C. Harp

Name Mrs. Peter L. Ferry
3030 Chevy Chase Drive,
Glendale, Calif.

STATEMENT OF TOTAL TAX LIABILITY

Year	Tax Previously Assessed	Adjustments Proposed in Accompanying Report		Correct Tax Liability
		Deficiency	Overassessment	
1928	\$1,196.46	\$96.43	\$.....	\$1,292.89
Totals.....		.....	.....	.....

Note

The amount shown in the first column of the above statement is the amount assessed on the original return except as indicated in the following summary of adjustments previously made:

Year 19

Original tax
 Deficiency assessed....., 19 ,
 or
 Overassessment scheduled....., 19 ,
 Net tax previously assessed.....

Year 19

(Plaintiff's Exhibit No. 45)

-2-

Mrs. Peter L. Ferry.

PRELIMINARY STATEMENT

Summary

<u>Year</u>	<u>Deficiency</u>
1928	\$96.43

The above stated deficiency results from the increase in income from trusts as indicated in Schedule 1 of report of husband attached.

Changes were discussed with husband, Peter L. Ferry, who offers no objections, and waiver from 870 is submitted.

-3-

Mrs. Peter L. Ferry

SCHEDULE NO. 1

Computation of Tax

	Year 1928.
Net income (from Schedule 1) of report of husband	\$23,049.03
Income subject to surtax	\$23,049.03
Personal exemption and credit for dependents allowed in husband's report	\$23,049.03
Normal tax at	
1½% on \$ 4,000.	60.00
3% 4,000.	120.00
5% 15,049.03	752.45
Surtax on 23,049.03	382.94
	1,315.39
Total Tax	\$ 1,315.39

(Plaintiff's Exhibit No. 45)

Less: Credit of 25% for earned net income (from Schedule 1-A)	22.50
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Total Tax Assessable	\$ 1,292.89
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Tax previously assessed	1,196.46
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Additional tax to be assessed	\$ 96.43
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SCHEDULE NO. 1-A

Computation of Earned Income Credit

	Year 1928.
Earned net income	\$5,000.00

Normal tax at

1% $\frac{1}{2}$ on \$4,000.	60.00	
3% 1,000.	30.00	90.00

Total Tax	\$ 90.00
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Credit of 25 per cent	\$ 22.50
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[Endorsed]: No. 2106 OC. Ferry vs. Rogan. Plf.
Exhibit No. 45 in evid. Filed 6/3, 1943 By Cross,
Deputy Clerk.

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
OR INCOMES, REGARDLESS OF AMOUNT, FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1928

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1929

(PRINT NAME AND ADDRESS PLAINLY BELOW)

Mrs Peter L Ferry

3030 Gdery Chase Drive

Glendale Cal Los Angeles Cal

Occupation, Profession, or Business *Housewife*

- Are you a citizen or resident of the United States? *yes*
- If you filed a return for 1927, to what Collector's office was it sent? *Return filed for 1927*
- Is this a joint return of husband and wife? *yes*
- Is the name of husband or wife if a separate return was made and the Collector's office where it was sent? *Glendale Cal*
- Were you married and living with husband or wife on the last day of your taxable year? *yes*
- If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you?
- If your status in respect to questions 5 and 6 changed during the year, state date and nature of change.
- How many dependent persons (other than husband or wife under 18, age or incapable of self-support because mentally or physically defective receiving their chief support from you on the last day of your taxable year) were you supporting?

INCOME

- Salaries, Wages, Commissions, etc. (State name and address of person from whom received) *3030 Gdery Chase Drive*
- Income from Business or Profession. (From Schedule A)
- Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source) *3.434.30*
- Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source
- Income from Partnerships. (State name and address)
- (a) Income from Fiduciaries. (State name and address) *California Trust Company Bank Los Angeles Trust Company*
- Rents and Royalties. (From Schedule B)
- Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)
- Dividends on Stock of Domestic Corporations
- Taxable Interest on Liberty Bonds, etc. (From Schedule D)
- Other Income (including dividends received on stock of foreign corporations). (State nature of income)

DEDUCTIONS

- Interest Paid
- Taxes Paid. (Explain in Schedule F)
- Losses by Fire, Storm, etc. (Explain in Table on page 2)
- Bad Debts. (Explain in Schedule F)
- Contributions. (Explain in Schedule F)
- Other Deductions Authorized by Law. (Explain in Schedule F)
- TOTAL DEDUCTIONS IN ITEMS 11 TO 16
- NET INCOME (Item 10 minus Item 17)

EARNED INCOME CREDIT

- Earned Net Income (Item 10 over \$30,000)
- Less Personal Exemption and Credit for Dependents (see Instruction 20)
- Balance (Item 19 minus Item 20)
- Amount taxable at 1 1/2% (not over the first \$4,000 of Item 21)
- Amount taxable at 3% (not over the second \$4,000 of Item 21)
- Amount taxable at 5% (balance over \$8,000 of Item 21)
- Normal Tax (1 1/2% of Item 22)
- Normal Tax (3% of Item 23)
- Normal Tax (5% of Item 24)
- Surtax on Item 19 (see Instruction 21)
- Tax on Earned Net Income (Items 25, 26, 27, and 28)
- Credit of 25% of Item 29 over 25% of Items 28, 42, 43, and 44
- Net Income (Item 18 above)
- Less Dividends (Item 7 above)
- Interest on Liberty Bonds, etc. (Item 8)
- Credit for Dependents
- Personal Exemption
- Total of Items 32, 33, 34, and 35
- Balance (Item 31 minus Item 36)
- Amount taxable at 1 1/2% (not over the first \$4,000 of Item 37)
- Balance (Item 37 minus Item 38)
- Amount taxable at 3% (not over the second \$4,000 of Item 37)
- Amount taxable at 5% (balance over \$8,000 of Item 37)
- Normal Tax (1 1/2% of Item 39)
- Normal Tax (3% of Item 40)
- Normal Tax (5% of Item 41)
- Surtax on Item 18 (see Instruction 21)
- Total of Items 42, 43, and 44
- Adjustment for Capital Gains or Losses (see Instruction 22)
- Total of Items 45 and 46
- Less Credit of 25% of Item 47 over Earned Net Income (Item 29)
- Total Tax (Item 48 minus Item 49)
- Less Income Tax Paid at Source
- Income and Profits Tax (see Instruction 23)
- Balance of Tax (Item 50 minus Item 51)

COMPUTATION OF TAX (See Instruction 21)

I swear (or affirm) that this return, including the accompanying schedules and statements of any other income, has been examined by me, and to the best of my knowledge and belief is true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1928, and the Regulations thereunder.

1. Total receipts from business or profession (state kind of business)

INDIVIDUAL INCOME TAX RETURN

Do Not Write in These Spaces
9198651

FOR NET INCOME FROM SALARIES OR WAGES OF MORE THAN \$3,000
OR INCOME, REGARDLESS OF AMOUNT, FROM BUSINESS, PROFESSION, SERVICE, OR SALE OF PROPERTY

For Calendar Year 1928

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1929

PRINT NAME AND ADDRESS PLAINLY BELOW

Peter L Ferry & Main Corporation

3030 Clevy Chase

Los Angeles Cal

Nov 25 1930

Occupation, Profession, or Business Building Contractor

Is the taxpayer a citizen or resident of the United States?
Selected a return for 1927, as Collector's office was notified of joint return of husband and wife if separate return was made and the prior's office where it was sent

- Were you married and living with husband or wife on the last day of your taxable year? yes
- If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? no
- If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. no
- How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? 0

From Salaries, Wages, Commissions, etc. (State name and address of person from whom received)

Amount received 125901
Exemption paid (Explain in Schedule F) 37.130

From Business or Profession. (From Schedule A)
From Bank Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source)

Interest on Tax-free Government Bonds Upon Which a Tax was Paid at Source

From Partnerships. (State name and address)

Income from Fiduciaries. (State name and address) See Single Item Federal Trust Security Fund
First Guaranty Trust Co Chicago

And Royalties. (From Schedule B)

From Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)

Dividends on Stock of Domestic Corporations

Interest on Liberty Bonds, etc. (From Schedule E)

Income including dividends received on stock of foreign corporations. (State nature of income)

TOTAL INCOME IN ITEMS 1 TO 9

33855.72

DEDUCTIONS

Not Paid

Paid. (Explain in Schedule F)

By Fire, Storm, etc. (Explain in Table on page 2)

Debit. (Explain in Schedule F)

Portions. (Explain in Schedule F) See Single Item Community Trust Co

Deductions Authorized by Law. (Explain in Schedule F)

2791.38
31068.38

TOTAL DEDUCTIONS IN ITEMS 10 TO 16

NET INCOME (Item 17 minus Item 12)

EARNED INCOME CREDIT

Not Net Income over \$20,000

For taxable at 15% and over the \$20,000

For taxable at 3% and over the \$4,000 of Item 21

For taxable at 5% balance over \$4,000 of Item 21

For taxable at 15% of Item 22

For taxable at 3% of Item 23

For taxable at 5% of Item 24

For Item 10 see Instruction 21

For Item 10 see Instruction 21

COMPUTATION OF TAX (See Instruction 21)

- Net Income Item 17 above 31068.38
- Less Deductions Item 16 above 2791.38
- Interest on Liberty Bonds etc Item 8 24.00
- Credit for Dependents 24.00
- Personal Exemption 3.00
- Total of Items 32, 33, 34, and 35 5900.00
- Balance Item 31 minus Item 36 25768.38
- Amount taxable at 15% and over the first \$4,000 of Item 37 4.00
- Balance Item 37 minus Item 38 2168.38
- Amount taxable at 3% and over the second \$4,000 of Item 37 9.00
- Amount taxable at 5% balance over \$4,000 of Item 37 2168.38

- Normal Tax (15% of Item 38) 6.00
- Normal Tax (3% of Item 39) 120.00
- Normal Tax (5% of Item 40) 858.4
- Surplus on Item 18 over lastings Item 21 968.4
- Tax on Net Income total of Items 42, 43, 44, and 45 2003.8
- Adjustment for Capital Gains 15% of Item 46 120.00
- Total of or difference between Items 46 and 47 376.7
- Less Credit of 25% of Tax on Earned Net Income Item 30 376.7
- Total Tax Item 48 minus Item 49 376.7
- Less Income Tax Paid at Source 120.00
- Income and Profits Taxes paid to foreign countries or U.S. possessions 0.00
- Balance of Tax Item 51 minus Items 50 and 52 256.7

AFFIDAVIT

I, the taxpayer, certify that this return, including the accompanying schedules and statements if any, has been examined by me and to the best of my knowledge and belief is true and correct. I declare under penalty of perjury that the foregoing is true and correct.

Signature of taxpayer Peter L Ferry
Date March 13 1929

Other Business Dispositions

Location of deductions: 20 Depreciable on Coast Highway Road 14th corner & East Gatehouse on left

1. Kind of Property

14 Frame Develop

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6.)

Am't

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS1. KIND OF PROPERTY

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions)

(c) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia.....

(d) Securities issued under Federal Farm Loan Act, or under such Act as Amended.....

(e) Liberty Bonds and other obligations of the United States issued on or before September 1, 1917, and obligations of the Treasury of the United States.....

(f) Liberty A and B Bonds; Treasury Certificates, 3 and 4 1/2 % Bonds, 4 1/2 % Bonds, Treasury Certificates of Indebtedness, and Treasury Savings Certificates.....

(g) TREASURY NOTES.....

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

14 Farm Buildings

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 11.

1. NAME	2. ADDRESS	3. CITY	4. STATE	5. ZIP	6. PHONE	7. FAX	8. E-MAIL	9. COMMENTS
1. NAME	2. ADDRESS	3. CITY	4. STATE	5. ZIP	6. PHONE	7. FAX	8. E-MAIL	9. COMMENTS

POLICY 2145687,
2145-686 to 2145-691, inc.

The Equitable Life Assurance Society

~~100 checks~~

No. 2103

GLENDALE, CALIFORNIA

***\$127AND00CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR
FERNANDO ROAD 40 BROADWAY
GLENDALE CALIF.
GLENDALE 1280, CA 91204

ER OF

CAMPBELL NATIONAL BANK

GLENDALE, CALIFORNIA

No. 25014

GLENDALE, CAL.

***\$779AND40CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR
FERNANDO ROAD 40 BROADWAY
GLENDALE CALIF.
GLENDALE 1280, CA 91204

STATE BANK

No. 2102

GLENDALE, CALIFORNIA

***\$127AND00CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR
FERNANDO ROAD 40 BROADWAY
GLENDALE CALIF.
GLENDALE 1280, CA 91204

CAMPBELL NATIONAL BANK
GLENDALE, CALIFORNIA

No. 2499

GLENDALE, CALIFORNIA

***\$127AND00CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR
FERNANDO ROAD 40 BROADWAY
GLENDALE CALIF.
GLENDALE 1280, CA 91204

CAMPBELL NATIONAL BANK
GLENDALE, CALIFORNIA

No. 2100

GLENDALE, CALIFORNIA

PETER L. FERRY
GENERAL CONTRACTOR
FERNANDO ROAD 40 BROADWAY
GLENDALE CALIF.
GLENDALE 1280, CA 91204

STATE BANK

L FERRY
AL CONTRACTOR
1000 ROADWAY
GLENDAL CALIF 9224
No. 2104
GLENDAL CALIFORNIA
1957
\$ 123.05
DOLLARS
NATIONAL BANK
GLENDAL CALIFORNIA
Robert L. Ferry
Contractor

L FERRY
AL CONTRACTOR
1000 ROADWAY
GLENDAL CALIF 9224
No. 2105
GLENDAL CALIFORNIA
1957
\$ 123.05
DOLLARS
NATIONAL BANK
GLENDAL CALIFORNIA
Robert L. Ferry
Contractor

L FERRY
AL CONTRACTOR
1000 ROADWAY
GLENDAL CALIF 9224
No. 4700
GLENDAL CALIFORNIA
1957
\$ 123.05
DOLLARS
NATIONAL BANK
GLENDAL CALIFORNIA
Robert L. Ferry
Contractor

L FERRY
AL CONTRACTOR
1000 ROADWAY
GLENDAL CALIF 9224
No. 4789
GLENDAL CALIFORNIA
1957
\$ 125.06
DOLLARS
NATIONAL BANK
GLENDAL CALIFORNIA
Robert L. Ferry
Contractor

L FERRY
AL CONTRACTOR
1000 ROADWAY
GLENDAL CALIF 9224
No. 4788
GLENDAL CALIFORNIA
1957
\$ 125.06
DOLLARS
NATIONAL BANK
GLENDAL CALIFORNIA
Robert L. Ferry
Contractor

L FERRY
AL CONTRACTOR
1000 ROADWAY
GLENDAL CALIF 9224
No. 4787
GLENDAL CALIFORNIA
1957
\$ 125.06
DOLLARS
NATIONAL BANK
GLENDAL CALIFORNIA
Robert L. Ferry
Contractor

PAY TO THE ORDER OF
NATIONAL BANK
GLENDAL CALIFORNIA

PAY TO THE ORDER OF
NATIONAL BANK
GLENDAL CALIFORNIA

PAY TO THE ORDER OF
NATIONAL BANK
GLENDAL CALIFORNIA

PAY TO THE ORDER OF
NATIONAL BANK
GLENDAL CALIFORNIA

PAY TO THE ORDER OF
NATIONAL BANK
GLENDAL CALIFORNIA

PAY TO THE ORDER OF
NATIONAL BANK
GLENDAL CALIFORNIA

No. 4786

GLENDAL CALIFORNIA

★★\$120AND55CTS

DOLLARS

NAL BANK
LE, CALIFORNIA

No. 4785

GLENDAL CALIFORNIA

★★\$120AND55CTS

DOLLARS

NAL BANK
LE, CALIFORNIA

PETER L. FERRY
GENERAL CONTRACTOR

No. 5867

GLENDAL CALIFORNIA

★★\$122AND44CTS

DOLLARS

NAL BANK
ORNIA

PETER L. FERRY
GENERAL CONTRACTOR

No. 5868

GLENDAL CALIFORNIA

★★\$122AND44CTS

DOLLARS

NAL BANK
ORNIA

PETER L. FERRY
GENERAL CONTRACTOR

No. 5869

GLENDAL CALIFORNIA

★★\$122AND44CTS

DOLLARS

NAL BANK
ORNIA

PETER L. FERRY
GENERAL CONTRACTOR

No. 5870

GLENDAL CALIFORNIA

PETER L. FERRY
GENERAL CONTRACTOR

No. 5571

GLENDAL CALIFORNIA

***\$117 AND 05 CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR

No. 5572

GLENDAL CALIFORNIA

***\$117 AND 05 CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR

No. 7409

GLENDAL CAL.

***\$547 74 CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR

No. 7408

GLENDAL CAL.

***\$547 46 CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR

No. 7407

GLENDAL CAL.

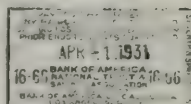
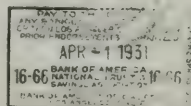
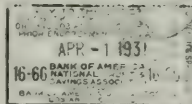
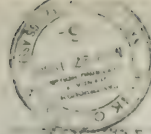
***\$547 46 CTS

DOLLARS

PETER L. FERRY
GENERAL CONTRACTOR

No. 7406

GLENDAL CAL.



PETER L. FERRY
GENERAL CONTRACTOR

No. 7305

GLENDALE, CAL.

1933

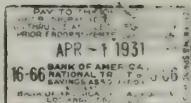
PAY TO THE
ORDER OF

Equitable Life Insurance Society \$625.50

DOLLARS

NAL BANK /
DALE, CALIF.

Peter L. Ferry



PETER L. FERRY
GENERAL CONTRACTOR

No. 7404

GLENDALE, CAL.

1933

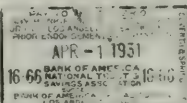
PAY TO THE
ORDER OF

Equitable Life Insurance Society \$625.50

DOLLARS

NAL BANK /
DALE, CALIF.

Peter L. Ferry



PETER L. FERRY
GENERAL CONTRACTOR

No. 7410

GLENDALE, CAL.

1933

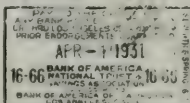
PAY TO THE
ORDER OF

Equitable Life Insurance Society \$346.79

DOLLARS

NAL BANK /
DALE, CALIF.

Peter L. Ferry



PETER L. FERRY
GENERAL CONTRACTOR

No. 10312

GLENDALE, CAL.

1933

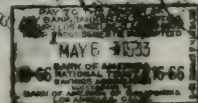
PAY TO THE
ORDER OF

Equitable Life Insurance Society \$843.75

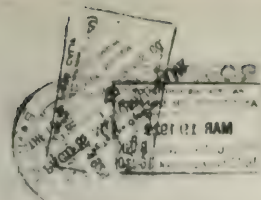
DOLLARS

NAL BANK /
DALE, CALIF.

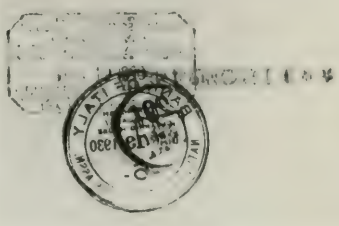
Peter L. Ferry



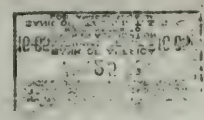
No. 2034
 GLENDALE, CALIFORNIA
 March 7 1948
 \$150.00
 ***\$130 AND 44 CTS
 DOLLARS
 NATIONAL BANK
 GLENDALE, CALIFORNIA



PETER L. FERRY
 GENERAL CONTRACTOR
 No. 7403
 GLENDALE, CAL.
 \$150.00
 ***\$130 AND 44 CTS
 DOLLARS
 NATIONAL BANK
 GLENDALE, CALIF.

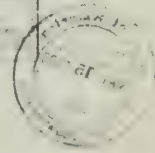
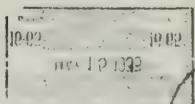


PETER L. FERRY
 GENERAL CONTRACTOR
 No. 10376
 GLENDALE, CAL.
 \$150.00
 ***\$130 AND 44 CTS
 DOLLARS
 NATIONAL BANK
 GLENDALE, CALIF.

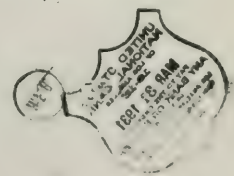


CIVILIAN
 ORDER BY

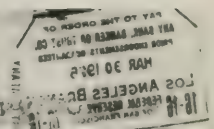
HEAD OFFICE
 California Bank
 Los Angeles Cal. April 20 1948
 \$150.00
 ***\$130 AND 44 CTS
 DOLLARS
 NATIONAL BANK
 GLENDALE, CALIF.



PETER L. FERRY
 GENERAL CONTRACTOR
 No. 5528
 GLENDALE CALIFORNIA
 \$150.00
 ***\$130 AND 44 CTS
 DOLLARS
 NATIONAL BANK
 GLENDALE, CALIF.



No. 4761
 GLENDALE CALIFORNIA
 \$150.00
 ***\$130 AND 44 CTS
 DOLLARS
 NATIONAL BANK
 GLENDALE, CALIF.



[PLAINTIFF'S EXHIBIT NO. 59]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

TREASURY DEPARTMENT

Internal Revenue Service

939 South Broadway

Los Angeles, Calif.

January 25th, 1937

MT-ET

District 6th., Cal.

Estate of Peter Ferry

Date of death June 16th., 1935

Freston & Files, Attorneys for the Executrix,

Bank of America Building

Los Angeles, Cal.

Sirs:

My investigation and audit in the above named estate results in recommendations to the Bureau as follows:

Changes only in form 706 return are as follows:

Schedule C-2 Life Insurance.

Total	\$160,071.24	\$292,632.72
-------	--------------	--------------

Any community interest of the surviving spouse is not an allowable deduction. Jas Newman decision case 29 B.T.A. page 53.

Total insurance.....	\$331,632.72
Less	\$ 40,000.00

Taxable insurance	\$292,632.72
-------------------	--------------

(Plaintiff's Exhibit No. 59)

Schedule D-1. Jointly owned

property	\$ 6,233.33	\$ 8,549.27
Item 1. Cash in bank	3,140.70	3,460.70
Verified in the sum of \$3,460.70 at said Bank on date of de- cedents death.		
Item 3.	14.29	28.59
Recommended in the full amount of cash in this account, same being decedents own moneys.		
Items 7 & 8.	175.13	348.27
Recommended for same reasons as for Item 3 above.		
Item 11.	100.00	1,225.00
Sales at 35 is recom- mended. Contribution was all by decedent.		
Item 14.	262.50	945.00
Pledger & Co. L.A. mean of Bid and Asked of $2\frac{1}{4}$ is recommended. Contribution was all by decedent.		
Item 16. No market value apart from R.E.	\$ 50.00	Nil

(Plaintiff's Exhibit No. 59)

Schedule D-2	Total	\$ 1,625.00	\$ 5,155.00
--------------	-------	-------------	-------------

Item not returned of
Furniture and Furnish-
ings in decedents home
at 3030 Chevy Chase,
Glendale, appraised at
\$3,530.00 is added to
this schedule.

Schedule E.	Total	None.	\$610,837.45
-------------	-------	-------	--------------

The six trusts are recommended as taxable transfers.

Trust No.

#2012	Citizens Nat'l Tr. & Sav. Bk.	\$ 82,289.16
-------	-------------------------------	--------------

Only difference from Leslie's re-
port is that all interest accrued is
recommended taxable. Item 18 in
said trust as to interest is corrected
to read \$48.11 instead of \$46.96

#6204.	Citizens Nat'l Tr. & Sav. Bk.	\$195,850.37
--------	-------------------------------	--------------

Total gross value of trust

assets	\$199,225.00 (Leslie's value)
--------	-------------------------------

Less taxes a lien at date
of death

3,374.63

Net assets	\$195,850.37
------------	--------------

#4358.	Sec-1st., Nat'l Tr. & Sav. Bk.	\$ 95,182.02
	(Leslie's value.)	

Total gross assets.	\$ 95,225.86
---------------------	--------------

Less taxes a lien.....	43.84
------------------------	-------

Net assets	\$ 95,182.02
------------	--------------

(Plaintiff's Exhibit No. 59)

#S-5869 Do. \$108,363.36

Leslie's total was \$107,254.91 Rec.

Item 1. 9,775.00

Hartley Rogers & Co., Bid of 85

Item 2. 3,288.75

N.Y.S.Ex. sales at 117-3/8 is rec.

Item 6. 5,356.25

N.Y.Curb mean of sales T 107-1/8

Item 11. 2,102.50

N.Y.Curb mean of sales at 105-1/8

Item 12. 3,097.20

N.Y.S.Ex. mean of sales at 103.24

#S-1080. Title Guarantee Tr.

Co. ----- \$ 2,547.74

Total Trust assets \$26,950.00

Decedents interest 1/10 2,695.00

Less taxes a lien....1/10/ 147.26

Net assets 2,547.74

#P-1050 Title Guarantee &

Trust Co. ----- \$126,604.80

Total value of trust assets \$126,628.85

Less taxes a lien..... 24.05

Net value \$126,604.80

(Plaintiff's Exhibit No. 59)

Deductions..... Total \$ 14,126.18 \$ 9,909.60

Recommended allowable only to the extent of the value of the gross estate Probated.

Ruling of General Council in the Max Fertig estate, 11/19/34. Re—Est. John C. Bullock

Credit for State Inheritance Taxes paid is disallowed temporarily until proof is filed.

Copy of Form 722 is enclosed.

A waiver form showing a deficiency tax of \$131,195.69 is enclosed and it is requested that the Executrix sign it and return to this office.

Respectfully,

Nat H. Eddy

Internal Revenue Agent.

[Endorsed]: No. 2106 OC. Ferry vs. Rogan. Plf. Exhibit No. 59 for ident., later in evid. Filed 6/3, 1943. By Cross, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 61]

Metropolitan Life

MEMORANDUM

To: W. Partridge, Claim Division
 From: C. J. Stahl, Ordinary Audit
 Subject: Policy 1032329-A—Peter L. Ferry

On policy 1032329-A the following premiums less dividends were paid:

<u>Due Date</u>	<u>Amount of Premium</u>	<u>Date of Payment</u>	<u>Amount of Dividend</u>
May 28, 1915	\$ 66.10	May 29, 1915	—
November 28, 1915	66.10	November 6, 1915	—
May 28, 1916	66.10	May 13, 1916	—
November 28, 1916	66.10	October 28, 1916	—
May 28, 1917	66.10	May 5, 1917	—
November 28, 1917	66.10	November 24, 1917	—
May 28, 1918	66.10	May 4, 1918	—
November 28, 1918	66.10	October 24, 1918	—
May 28, 1919	66.10	May 3, 1919	—
November 28, 1919	66.10	November 1, 1919	—
May 28, 1920	66.10	April 24, 1920	—
November 28, 1920	66.10	December 11, 1920	—
May 28, 1921	66.10	May 14, 1921	—
November 28, 1921	66.10	November 26, 1921	—
May 28, 1922	66.10	May 13, 1922	3.74
November 28, 1922	66.10	November 25, 1922	—
May 28, 1923	66.10	April 28, 1923	4.54
November 28, 1923	66.10	October 27, 1923	—
May 28, 1924	66.10	April 26, 1924	9.70
November 28, 1924	66.10	November 1, 1924	—
May 28, 1925	66.10	May 16, 1925	24.00
November 28, 1925	66.10	October 31, 1925	—

(Plaintiff's Exhibit No. 61)

<u>Due Date</u>	<u>Amount of Premium</u>	<u>Date of Payment</u>	<u>Amount of Dividend</u>
May 28, 1926	66.10	May 1, 1926	28.47
November 28, 1926	66.10	November 27, 1926	—
May 28, 1927	66.10	May 7, 1927	31.85
November 28, 1927	66.10	December 3, 1927	—
May 28, 1928	66.10	May 5, 1928	33.45
November 28, 1928	66.10	November 24, 1928	—
May 28, 1929	66.10	April 20, 1929	35.17
November 28, 1929	66.10	October 12, 1929	—
May 28, 1930	66.10	April 19, 1930	40.51
November 28, 1930	66.10	November 8, 1930	—
May 28, 1931	66.10	April 18, 1931	35.59
November 28, 1931	66.10	January 2, 1932	—
May 28, 1932	66.10	April 30, 1932	40.50
November 28, 1932	66.10	December 24, 1932	—
May 28, 1933	66.10	May 20, 1933	37.80
November 28, 1933	66.10	November 25, 1933	—
May 28, 1934	66.10	April 28, 1934	39.09
November 28, 1934	66.10	November 17, 1934	—
May 28, 1935	66.10	June 8, 1935	39.09
<hr/> Total			<hr/> 403.50

When Claim was paid premium refund of \$55.08 was allowed and a dividend of \$3.37 was paid.

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Plf. Exhibit No. 61 in evid. Filed 6/8-1943. By Cross, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 62]

Metropolitan Life

MEMORANDUM

To: W. Partridge, Claim Division

From: C. J. Stahl, Ordinary Audit

Subject: Policy 1032491-A—Peter L. Ferry

On policy 1032491-A the following premiums less dividends were paid:

<u>Due Date</u>	<u>Amount of Premium</u>	<u>Date of Payment</u>	<u>Amount of Dividend</u>
May 28, 1915	\$ 64.62	June 12, 1915	—
November 28, 1915	64.62	November 6, 1915	—
May 28, 1916	64.62	May 13, 1916	—
November 28, 1916	64.62	October 28, 1916	—
May 28, 1917	64.62	May 5, 1917	—
November 28, 1917	64.62	November 24, 1917	—
May 28, 1918	64.62	May 4, 1918	—
November 28, 1918	64.62	October 24, 1918	—
May 28, 1919	64.62	May 3, 1919	—
November 28, 1919	64.62	November 1, 1919	—
May 28, 1920	64.62	April 24, 1920	—
November 28, 1920	64.62	November 13, 1920	—
May 28, 1921	64.62	May 14, 1921	—
November 28, 1921	64.62	November 26, 1921	—
May 28, 1922	64.62	May 13, 1922	3.66
November 28, 1922	64.62	November 25, 1922	—
May 28, 1923	64.62	April 28, 1923	4.44
November 28, 1923	64.62	October 27, 1923	—
May 28, 1924	64.62	April 26, 1924	9.48
November 28, 1924	64.62	November 1, 1924	—
May 28, 1925	64.62	May 2, 1925	23.46
November 28, 1925	64.62	October 31, 1925	—

(Plaintiff's Exhibit No. 62)

<u>Due Date</u>	<u>Amount of Premium</u>	<u>Date of Payment</u>	<u>Amount of Dividend</u>
May 28, 1926	64.62	May 1, 1926	24.84
November 28, 1926	64.62	November 27, 1926	—
May 28, 1927	64.62	May 7, 1927	31.14
November 28, 1927	64.62	December 3, 1927	—
May 28, 1928	64.62	May 5, 1928	32.70
November 28, 1928	64.62	November 24, 1928	—
May 28, 1929	64.62	April 20, 1929	34.38
November 28, 1929	64.62	October 12, 1929	—
May 28, 1930	64.62	April 19, 1930	36.24
November 28, 1930	64.62	November 8, 1930	—
May 28, 1931	64.62	April 18, 1931	38.16
November 28, 1931	64.62	January 2, 1932	—
May 28, 1932	64.62	April 30, 1932	39.60
November 28, 1932	64.62	December 24, 1932	—
May 28, 1933	64.62	May 20, 1933	36.96
November 28, 1933	64.62	November 25, 1933	—
May 28, 1934	64.62	April 28, 1934	38.22
November 28, 1934	64.62	November 17, 1934	—
May 28, 1935	64.62	June 8, 1935	38.22
Total	2,649.42		391.50

When Claim was paid premium refund of \$53.85 was allowed and a dividend of \$3.29 was paid.

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Plf. Exhibit No. 62 in evid. Filed 6/8-1943. By Cross, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 63]

DISTRIBUTIONS OF INCOME FROM
TRUST #1052

TITLE GUARANTEE & TRUST COMPANY

1925		August 1	500.00
March 18	\$ 3,576.45	August 31	500.00
1926		October 1	500.00
April 21	261.46	November 1	500.00
June 16	247.26	December 3	500.00
August 21	3,359.90	December 31	500.00
November 19	465.71	1929	
1927		February 1	500.00
March 2	446.50	March 1	500.00
March 9	500.00	April 1	500.00
April 1	500.00	May 1	500.00
May 2	500.00	June 1	500.00
June 1	500.00	July 1	500.00
July 1	500.00	August 1	500.00
July 30	500.00	September 3	500.00
August 30	500.00	October 1	4,500.00
October 1	500.00	November 1	500.00
November 1	500.00	December 2	500.00
November 28	2,500.00	December 31	500.00
December 1	500.00	1930	
December 21	500.00	January 1	500.00
1928		February 1	500.00
February 1	500.00	March 1	500.00
March 1	500.00	April 1	500.00
April 2	500.00	April 25	500.00
May 2	500.00	May 29	500.00
June 1	500.00	July 1	500.00
June 30	500.00	August 1	500.00

(Plaintiff's Exhibit No. 63)

August 29	500.00	December 30	500.00
October 1	500.00	1933	
November 1	500.00	January 31	500.00
December 1	500.00	February 28	500.00
1931		March 31	500.00
January 2	\$ 500.00	April 28	500.00
January 28	500.00	May 30	500.00
February 27	500.00	June 30	500.00
March 31	500.00	August 1	500.00
May 1	500.00	August 30	500.00
June 1	500.00	September 28	500.00
July 1	500.00	November 1	500.00
August 1	500.00	December 1	500.00
August 28	500.00	December 2	5,000.00
September 29	500.00	December 11	2,000.00
October 30	500.00	December 30	500.00
November 30	500.00	1934	
December 30	500.00	January 31,	500.00
1932		February 28	500.00
January 29	500.00	March 31	500.00
February 29	500.00	April 19	1,700.00
March 30	500.00	April 30	500.00
May 2	500.00	June 1	500.00
May 31	500.00	June 29	500.00
June 30	500.00	August 1	500.00
August 1	500.00	August 30	500.00
August 31	500.00	September 29	500.00
September 30	500.00	November 1	500.00
November 1	500.00	December 1	500.00
November 30	500.00	December 31	500.00

(Plaintiff's Exhibit No. 63)

1935

1935—Cont'd.

January 29	500.00	April 30	\$ 500.00
February 27	500.00	May 28	500.00

Died 6/16/35

\$73 110.78

Balance Income on Hand Available for

Distribution on 6/16/35

\$ 1,749.56

[Endorsed]: No. 2106 OC. Ferry vs. Rogan. Plf. Exhibit No. 63. Filed 6/8, 1943. By Cross, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 64]

A.M.J.

June 8, 1943

Summary of Interest, Accrued Interest, and Income Cash
on Hand in the Various Trusts,
Peter L. Ferry Estate

Trust No.	Held by	Bond Interest Accrued	Accrued Interest on Notes	Income Cash on Hand
		6/16/35	6/16/35	6/16/35
Trust S-5869	Security-First	459.02	438 41	88 54
" 1080	Title Guarantee & Trust	.....	.....	.....
" 6204	Citizens Nat.	.....	.....	.....
" S.S.-4358	Security-First	475 88	807 78	.....
" 2012	Citizens Nat.	111 93	380 56	46 02
" P-1052	Title Guarantee & Trust		878 72	1 749 56

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Exhibit No. 64 in evid. Filed 6/8, 1943. By Cross, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 65.]

[Title of District Court and Cause.]

DEFENDANT'S PRE-TRIAL BRIEF FOR JUDGE
O'CONNOR

This is an action to recover a refund of estate taxes. The ultimate questions are whether the Commissioner erred in determining

1st, that the full value of the assets of five revocable trusts created in decedent's lifetime was includible in his gross estate,

2d, that the transfer by decedent of a 1/20 undivided beneficial interest in a trust, made by him to his son a week or two before his death, was so includible, and

3d, that the total proceeds of 20 or 21 insurance policies on the life of decedent were so includible.

Plaintiff contends that the value of one-half of each type of property was erroneously included.

The determination of these three ultimate questions depends upon the Court's answers to other questions of both law and fact.

I.

FIVE REVOCABLE TRUSTS

Four of the five trusts were created by decedent in 1925, his wife joining in the approval of each trust declaration. Mr. Ferry died in 1935. The fifth trust was created in 1930, the same mechanics being employed. Decedent, his wife and/or children were made beneficiaries of the income, if any, of the trusts and decedent retained for life the right, in conjunction with his wife or other beneficiary

(Plaintiff's Exhibit No. 65)

to revoke, alter, amend, change beneficiaries, their shares, etc.

The Government contends that the Commissioner correctly included the value of 100% of the assets in the gross estate under Sections 302(c) and (d) of the Revenue Act, since the properties placed in trust were owned by decedent, being either his separate or old-type community property, and were revocably transferred to the trust by him without a money's worth consideration.

The pertinent portions of Sections 302(c) and (d) of the applicable Act read as follows:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
* * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. . . .

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

(Plaintiff's Exhibit No. 65)

Before the Commissioner, plaintiff contended that for tax purposes on undivided half of the properties placed in the trusts was originally owned by her, but never presented to the Commissioner sufficient evidence to establish such fact. What evidence plaintiff will produce at the trial to support such factual contention is at this time unknown to the defendant.

In respect of one of these five trusts, No. 6204, the evidence may show that before its creation an undivided half of certain parcels of decedent's real property was given to his wife by the device of transforming the parcels into joint tenancy property, whereby he intentionally retained a possibility of reverter contingent upon his survivorship [*Helvering v. Hallock*, 309 U. S. 106 (1940)]. In such event, the gift was not then complete because "possession and enjoyment" were retained by the donor within the meaning of Section 302(c) (*Helvering v. Hallock*, *supra*), as well as within the express provisions of Sec. 302(e).

The applicable portions of Sec. 302(e) read as follows:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
* * *

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the

(Plaintiff's Exhibit No. 65)

banking business, in their joint names and payable to either or the survivor, except that part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth:"

It will be noted that by the broad provisions of Secs. 302(c), (d) and (e) Congress has endeavored to prevent the avoidance of estate taxes through practically any and all conceivable "incompleted" gift devices, plugging one loophole after another.

If, therefore, plaintiff establishes for the first time at the trial the existence of incomplete joint tenancy gifts to his wife, followed by incomplete, joint transfers of the same properties to a revocable trust, defendant's response will be twofold.

1st, regardless of the lifetime juggling of titles, tenancies and estates, decedent's gift to his wife of undivided half interests in these parcels of property were never complete until the moment of his death, and their value is, therefore, includible within the meaning of Sec. 302, particularly Secs. (c), (d) and (e) thereof.

2d, in the alternative, the joint tenure was not terminated when the properties were placed in the revocable trust, but continued until the moment of decedent's death. The properties fall, therefore, within the express provisions of Sec. 302(e). [Hornor v. Comm'r., 130 F. (2d) 649 (3d Cir.—Aug. 21, 1942), Aff'g 44 B. T. A. 1136, No. 175.]

(Plaintiff's Exhibit No. 65)

II.

THE SIXTH TRUST

The so-called Sixth Trust involves the question of whether a transfer was made by decedent to one of his sons of an undivided 1/20 beneficial interest in Subdivision Trust No. 1080, nineteen days before his death. If such transfer was made, there is a statutory presumption that it was in contemplation of death and the value thereof is includible in decedent's gross estate under Sec. 302(c), *supra*.

The value of this alleged gift is small. However, plaintiff will, no doubt, endeavor at the trial (1st) to establish the transfer, and (2d) to overcome such statutory presumption. The nature of the evidence that plaintiff will offer is now unknown to defendant.

III.

LIFE INSURANCE POLICIES

The proceeds of decedent's 20 or 21 life insurance contracts (payable to beneficiaries other than his estate) were substantial. We believe the evidence will show that they were entered into from time to time over a period of 20 to 30 years prior to his death, and that by the terms thereof decedent personally retained until his death the following exclusive rights, powers and benefits, among others, to wit:—

- 1st. To sell, assign and pledge said policies and surrender them for cash, all for his own personal and exclusive benefit.
- 2d. To collect and appropriate to his own personal and exclusive use and benefit the interest and dividends accruing thereunder.

(Plaintiff's Exhibit No. 65)

- 3d. To change the beneficiaries thereunder, and
- 4th. To possession, to enjoyment and to a possible reverter of all contractual benefits thereunder contingent upon his survivorship of the named beneficiaries.

The full proceeds of these policies in excess of \$40,000 were included by the Commissioner in decedent's gross estate. Defendant contends that it was error to include more than one-half of such excess on the theory that half the premiums were paid by the surviving wife with her money. This latter contention (that she paid half of the premiums) is made by plaintiff in an endeavor to bring this case within the rule announced and applied in *Lang v. Comm'r.*, 304 U. S. 264 (1938). There the premiums were paid with community funds of the Washington State type and the Supreme Court held that the proportion of the policy proceeds attributable to the Washington wife's community half of the premiums was not includible in the husband's gross estate under Sec. 302(g) of the Act. This Section reads as follows:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— . . .

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. . . ."

(Plaintiff's Exhibit No. 65)

Having the 1938 Supreme Court Lang case rule in mind, the Bureau gave plaintiff over 20 months (from February 9, 1939, to October 18, 1940) to present, in support of her refund claim, any evidence that might establish such premium ownership in the wife. During this 20-month period plaintiff was either unable or failed to submit evidence establishing that such premiums were paid with new-type (earned by either spouse after July 29, 1927) California community funds or with funds owned separately by her. Whether she will do so or be able to do so at the trial remains to be seen. Not knowing what evidence, if any, will be offered, it is impossible at this point to discuss its weight or sufficiency.

Defendant contends that the Commissioner did not err in including 100% of such excess proceeds in decedent's gross estate, and relies upon Secs. 302(c), (d) and (g) of the Act.

Respectfully submitted,

LEO V. SILVERSTEIN,

United States Attorney.

E. H. MITCHELL,

Assistant United States Attorney.

By E. H. MITCHELL

Attorneys for Defendant.

[Endorsed]: Filed Apr. 1, 1943. Edmund L. Smith, Clerk, by Francis E. Cross, deputy clerk.

[Endorsed]: No. 2106 OC. Ferry vs. Rogan. Plf. Exhibit No. 65 in evid. Filed 6/8, 1943. By Cross, Deputy Clerk.

[Title of District Court.]

United States of America,

Southern District of California—ss.

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26-A, 26-B, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 46, 47, 59, 61, 62, 63, 64, and 65, received in evidence on the trial of Case No. 2106-O'C Civil, Catherine B. Ferry, as Executrix of the Last Will and Testament of Peter Ferry, deceased, Plaintiff, vs. Ethel Strickland Rogan, as Executrix of the Estate of Nat Rogan, Collector of Internal Revenue for the Sixth District of California, deceased, Defendant, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 11th day of December, A. D. 1944.

(Seal)

EDMUND L. SMITH

Clerk,

By R. B. CLIFTON,

Deputy Clerk

[DEFENDANT'S EXHIBIT B]

Treasury Department
Internal Revenue Service
Twelfth floor, U. S. Post Office
and Courthouse
Los Angeles, Calif.
February 20, 1940.

Office of
Internal Revenue Agent in Charge
Los Angeles Division
MT:ET
District of 6th California
Estate of Peter Ferry
Date of death: June 16, 1935

Catherine B. Ferry, Executrix
c/o Claude I. Parker,
808 Bank of America Building,
Los Angeles, California.

Madam:

The examination by this office of the estate tax return of the above named estate, in connection with your claim for refund of \$63,825.77 indicates that the adjustment of tax liability shown in the accompanying statement is warranted.

If You Agree to the adjustment shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the deficiency in tax and to stop the accumulation of interest. Such interest will cease thirty days after the receipt of the executed

(Defendant's Exhibit B)

form, or upon the payment of the deficiency in tax to the Collector, whichever occurs first.

If you desire to make immediate payment of the deficiency in tax without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at Los Angeles, California, enclosing this letter, or a copy thereof. Interest on the deficiency in tax should be included in your remittance, computed at the rate of six per cent per annum from the due date of the tax to the date of payment.

If You Do Not Agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with this office, within thirty days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency against the estate. This letter is not a final notice of deficiency nor of disallowance of your claim, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed statement.

Should you fail to pay the deficiency in tax to the collector of internal revenue or to file with this office within the thirty-day period mentioned either a waiver on the enclosed form or a written protest, final determination of your tax liability will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of estate tax deficiencies, and the disallowance of your claim will be recommended.

(Defendant's Exhibit B)

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

George D. Martin

Internal Revenue Agent in Charge

Enclosures:

Statement.

Form of waiver.

Form of acknowledgment.

MT:ET

District of 6th California

Estate of Peter Ferry

Date of death: June 16, 1935

STATEMENT

Since no evidence has been furnished which would definitely establish the claim for deduction for community property, the following determination is proposed:

	Prior <u>Determination</u>	Proposed <u>Determination</u>
Gross estate,	\$931,863.04	\$931,863.04
Deductions, 1926 Act,	109,909.60	109,909.60
Net estate, 1926 Act,	821,953.44	821,953.44
Net estate, 1935 Act,	871,953.44	871,953.44
Gross tax, 1926 Act,		36,036.74
Credit for estate and inheritance taxes,		27,980.46
Net tax, 1926 Act,		8,056.28

(Defendant's Exhibit B)

Total taxes, 1926 and 1935 Acts,	149,588.36
Gross tax, 1926 Act,	36,036.74
	<hr/>
Net additional tax,	113,551.62
Net tax, 1926 Act,	8,056.28
	<hr/>
Total net tax,	121,607.90
Total tax assessed and paid,	120,758.97
	<hr/>
Deficiency,	848.93

CREDIT

Credit for State estate, inheritance, legacy or succession taxes is allowed in the amount of \$27,980.46. This is the total amount in respect to which the evidence required under Article 9 of Regulations 80 has been submitted. Kindly advise when the additional evidence, if any, may be expected.

If the full eighty per cent credit is allowed, it will eliminate any deficiency from this estate which is due entirely to the tentative disallowance of \$848.93, the amount for which evidence of payment may be furnished.

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Deft's Exhibit B in evid. Filed 6/8, 1943. Cross, Deputy Clerk.

[GOVERNMENT'S EXHIBIT C]

WILL

I, Peter L. Ferry, being of sound and disposing mind and memory, and not acting under duress, menace, fraud or undue influence of any person whatever, do hereby make, publish and declare my Last Will and Testament in the manner following, to wit:

First: I hereby revoke all former Wills by me made.

Second: I declare that all property now owned or possessed by me is community property of myself and my wife, Catherine B. Ferry, and I hereby give, devise and bequeath to my said wife, Catherine B. Ferry, all property subject to my power of testamentary disposition, whether real, personal or whatsoever character the same may be.

Third: I hereby declare that I am and my said wife, Catherine B. Ferry, have the following children: Mary Alice, James Leo, Peter Leo, Catherine Helen, John Melvin, William Francis and Patrick Robert. To each of them I bequeath Ten Dollars (\$10.00), as there has been made ample provision for each in certain trust funds created. I have full trust and faith and confidence that my said wife, Catherine B. Ferry, will in all respects fully care for and protect the interests of said children.

Fourth: In the event that my said wife fails to survive me, then I give, devise and bequeath everything of which I die possessed to Security-First National Bank of Los Angeles, as Trustee under its Declaration of Trust No. 5828, to be held, managed and disposed of according to the provisions of said Declaration of Trust.

(Government's Exhibit C)

Fifth: I hereby appoint my wife, Catherine B. Ferry, as the Executrix of this Will, to serve as such without bond, and in the event of her failure or inability to act then the Security-First National Bank of Los Angeles, a national banking association with its principal place of business in Los Angeles, California, as the Executor of this Will, and I confer upon her or it full power and authority as such Executrix or Executor to sell and dispose of any and all of the property of my estate in such manner and upon such terms as she or it may deem best without obtaining any order of court therefor.

In Witness Whereof, I have hereunto set my hand and seal this 10th day of May, 1930.

Peter L. Ferry

The foregoing instrument, consisting of two pages including the page signed by the Testator, was, on the date thereof, by the said Peter L. Ferry, subscribed, published and declared to be his Last Will and Testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have signed the same as witnesses thereto.

Fred H. Bushel Residing at 1847 Lake Str. (?)
Glendale

H. M. Ehrke Residing at Verdugo City, Cal.
R. F. 2734 Sycamore St.

.....Residing at.....

#151608

[Endorsed]: Filed Jul. 8, 1935. L. E. Lampton,
County Clerk; by P. E. Grey, Deputy.

(Government's Exhibit C)

Will admitted to probate this 31st day of July, 1935.
Attest : L. E. Lampton, County Clerk, by G. W. McDonald, Deputy.

The foregoing instrument is a correct copy of the original as the same appears of record. Attest: June 1st, 1936. L. E. Lampton, County Clerk and Clerk of the Superior Court in and for the County of Los Angeles, State of California. By G. F. Cooper, Deputy.

[Endorsed]: No. 2106 O'C. Ferry vs. Rogan. Gov. Exhibit No. C in evid. Filed June 4, 1943. By Cross, Deputy Clerk.

[DEFENDANT'S EXHIBIT D]

* * * * *

FIRST PAGE ESTATE TAX MAJOR REPORT

MT-ET 6th Calif. Los Angeles, Calif.,
Estate of: Peter Ferry,
Date of Death: June 16, 1935 January 25, 1937.
Deficiency Tax Recommended: \$131,195.69
Internal Revenue Agent in Charge,
Los Angeles, California.

Having completed my investigation of the return, Form 706, for the estate named above, as directed by your letter dated December 1, 1936, I herewith submit the following report:

Executor: Catherine B. Ferry,
c/o of Attorney.

Attorney: Freston & Files,
Bank of America Building,
Los Angeles, California.

(Defendant's Exhibit D)

Forms 704 and 706 used and returned. Form 722 enclosed.
Inheritance Tax Proof requested.

Waiver requested.

Exhibits attached: A, B, C & D.

DETAILS OF MY REPORT FOLLOW:

The return agrees with the inventory filed for probate, except as noted, and the values fixed on the items in the various trusts, attached to form 706 are those fixed by the State Inheritance Tax Appraiser appointed by the Court.

Total gross estate probated was \$9,909.60.

This case has been delayed in reporting due to the fact that the attorney for the estate postponed taking up the case until after the holidays.

The major portion of decedents wealth was transferred in trusts in 1925 and 1930, reserving to himself a portion of the income for life. Copies of all trust agreements are attached to form 706 and are summarized under Schedule E, but are claimed in the return as not taxable.

It is claimed in the return, under Schedule "E", page 3, (rider) that the interest retained by Catherine B. Ferry in said trusts was not transferred to her by decedent but represents the community property acquired by decedent and Catherine B. Ferry since their marriage. This claim is not tenable under the present ruling of the Bureau because said property was acquired by the decedent prior to July 29, 1927 and is therefore not community property vested in the wife.

Decedent was a paving contractor and made his money from that source.

(Defendant's Exhibit D)

SCHEDULE "A"

Total	\$675.00	\$675.00
Items 1 and 2.	400.00	400.00

Valued in probate at \$225.00 for the two parcels by Inheritance Tax Appraiser.

These two parcels of land consist of small unimproved property and fully returned here. Verified from the valuation of adjacent property in Trust 6204.

Items 3 and 4.	275.00	275.00
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These two parcels comprising 80 acres in Phelps County, Mo. are believed to be fully valued. Returned and recommended at the assessed value.

Estate of Peter Ferry

SCHEDULE "B"

Total	\$7,932.24	\$7,936.24
Items 1 to 29, incl.	4,822.49	4,822.49

These are street bonds and are returned and recommended at their full face value plus accrued interest which is the maximum value according to Trompeter & Company, street bond dealers. The security back of these bonds was owned by decedent in trusts.

Item 30.	125.00	125.00
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Officials of the Company report a nominal value of \$1.00 which value is recommended.

Items 31 and 32.	1,154.75	1,154.75
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Valued by the Bureau as returned.

(Defendant's Exhibit D)

Item 33.	Nil	Nil
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Corporation is defunct. Reported of no value in various estates.

Item 34.	580.00	584.00
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Valued at \$2.00 by Secretary of the Club, and is recommended. Par value \$10.00.

Item 35.	1,250.00	1,250.00
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Number of shares should read 100. Sales at 10 to 14 in 1935. Manager of said bank stated that 12½ was a high average. Recommended as returned at 12½.

SCHEDULE "C-1"

Total	127.36	127.36
Item 1.	127.36	127.36

This cash is correctly returned as verified from the records of said bank. Returned in probate.

Estate of Peter Ferry

Schedule "C-1" (Cont'd.)

Items 2 to 11 incl.	Nil	Nil
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Mr. James L. Ferry, eldest son of decedent advised me that soon after his father's death he made every attempt to collect these notes but in every case found the makers financially not responsible and without assets and has abandoned any hope of every recovering a cent on them. Item 8, note of James V. Ferry for \$307.00. The maker is a brother of decedent and went through bankruptcy in 1935. The notes of Willard Marble for \$2,062.50 and \$275.60 were found impossible to collect. Said Marble is a Promoter without financial responsibility and to bring suit would be throwing away good money in the opinion

(Defendant's Exhibit D)

of Mr. Ferry and the attorney for the estate. All are recommended at nil.

SCHEDULE "C-2"

Total	\$260,071.24	\$292,632.72
Items 1 to 20, incl.	260,071.24	291,632.72

Attached to form 706 are the forms 712 for each policy showing the full sum payable under each policy as extended and totals

	\$300,071.24	\$331,632.72
Less	40,000.00	40,000.00
	<hr/>	<hr/>
	260,071.24	291,632.72

The executor has erroneously deducted a community interest of Catherine B. Ferry, which is recommended not allowable under 29 B.T.A. page 53 decision in Jas. Newman.

Insurance not returned Nil \$ 1,000.00
See attached to form 706 form 712.

Knights of Columbus-Policy #21434 Face Value
\$1,000.00

Catherine B. Ferry, beneficiary.
Estate of Peter Ferry

SCHEDULE "D-1" (Joint tenancy)

Total	\$6,233.33	\$8,549.27
Item 1.	3,140.70	3,460.70

This was a joint account decedent with his son James L. Ferry and the correct balance of June 16, 1935 was \$3,460.70 as recommended. Mr. James L. Ferry claimed

(Defendant's Exhibit D)

that this account was a continuation of decedent's old business account and he was made a joint tenant on January 19, 1934, which is the fact, he however was unable to show a contribution to this account from sources not coming from the decedent.

By a written agreement signed by Peter L. Ferry, Catherine B. Ferry and James L. Ferry, dated September 29, 1931, decedent sold his business and road equipment to said James L. Ferry for \$10,000.00. A copy of said agreement is attached marked Exhibit "A". Across the original was written at the bottom, "Paid in full, Jan. 1, 1933" and signed Peter Ferry.

It appears that decedent turned over said road equipment to his son and allowed him to pay for it out of rental income. Decedent helped his son in said rental business but no contracts for road or other construction was taken after the son took over the business. James L. Ferry stated that decedent spent most of his time on the ranch in Fresno County after 1929. The son has continued the equipment rental business and according to his appraisal the equipment sold to him by decedent would be junk at time of decedent's death.

Item 2.	\$1,500.00	\$1,500.00
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This was a joint savings account, decedent with F. C. Diener, (a son-in-law) Ranch account. Correctly returned at verified from said banks records. Contribution of all said funds admitted as the moneys of the decedent, and the full amount is recommended taxable.

Item 3.	\$ 14.29	\$ 28.59
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The stated bank records show this to be a joint account decedent and his wife and the balance was \$28.59 on date

(Defendant's Exhibit D)

of decedents death. All of said account was contributed by the decedent and is recommended taxable.

Estate of Peter Ferry

Schedule "D-1" (Cont'd.)

Item 4.	\$ 235.68	\$ 235.68
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The stated bank records show this account to be a joint account, decedent, his wife and on 7/12/34 the name of Mary Alice Diener (decedent's daughter) was added. Balance at date of death was \$235.68. All of said account was contributed by the decedent and is recommended as taxable.

Items 5 and 6.	\$ 806.03	\$ 806.03
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These two accounts were joint with F. C. Diener and are correctly returned as verified from records in the hands of the Inheritance Tax Appraiser. All of said account was contributed by the decedent and is recommended taxable.

Items 7 and 8.	\$ 174.13	\$ 348.27
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These two items are fully returned as fixed by the stated depository and corporation title was joint, decedent and wife, and all money was contributed by the decedent. Recommended as all taxable.

Items 9 and 10.	Nil	Nil
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Defunct and out of business years ago. Recommended of no value.

Item 11.	\$ 50.00	\$1,225.00
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Sales reported by the Hospital officials at 35, and is recommended. Held jointly with wife. Contribution all by decedent.

(Defendant's Exhibit D)

Items 12 and 13.	\$ Nil	Nil
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Out of business and no trace can be found of any assets. Recommended as of no value.

Item 14.	\$ 262.50	\$ 945.00
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Mean of B & A, Pledger & Company, L. A. of 2¼ is recommended. Held jointly by decedent and wife. Contribution all by the decedent and is all recommended as taxable.

Estate of Peter Ferry

Schedule "D-1" (Cont'd.)

Item 15.	Nil	Nil
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Estate of A. Burlingame Johnson, date of death 6/27/34 360 shares returned and recommended "No Value".

Item 16.	\$50.00	Nil
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Officials state this stock is appurtenant to the real property owned by the decedent and cannot be sold separately. Has no market value. Recommended at nil in prior estates and so recommended here. Said real estate is listed as Item 11 of Trust No. 6204, attached to Form 706.

SCHEDULE "D-2"

Total	\$1,625.00	\$5,155.00
Items 1 to 4, incl.	1,425.00	1,425.00

These automobiles are returned and recommended at their Blue Book value. Verified from probate records.

Item 5.	\$ 200.00	\$ 200.00
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These items of ranch equipment were appraised by State Inheritance Tax appraiser of Fresno County appointed by

(Defendant's Exhibit D)

the Court and is recommended. Said items are situated on the ranch described in Item 35 (1) of Trust No. 6204, *lage* page, attached to form 706.

Item not returned.

Furniture and furnishings in decedent's home at 3030 N. Chevy Chase, Glendale, California	Nil	\$3,530.00
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The home real estate is set up as Item 2 of Trust 6204 at a value of \$20,000.00.

I made up an inventory, retained in my notes and fixed a value on the furniture and furnishings of \$3,530.00. Said furniture etc., was of mixed quality, some of it quite old, and it included no items of special value. Decedent's widow made no claim to said furniture and is all recommended as taxable. It has not been appraised by the State Inheritance Tax appraiser up to this date nor included in the probated estate.

Estate of Peter Ferry

SCHEDULE "E"

Total	Nil	\$610,837.45
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Attached to form 706 is a statement intended to explain certain transfers made by the decedent in 1925 when he with his wife created four trusts. in 1930, one trust, certain Bank stock to his son in 1934 and a certain interest in a trust in 1935.

The corpus of said trusts are alleged to consist of the community property of decedent and his wife Catherine B. Ferry and said trusts were made as a settlement of her

(Defendant's Exhibit D)

community interest, and were not made in contemplation of death.

It is obvious that all of the property transferred in the 1925 trusts was acquired by the decedent prior to July 29, 1927 and no attempt has been made on the part of the estates representatives to show or prove that the property in the 1930 trust was community property, and the interest in the trust transferred in 1935 was created in joint tenancy (1/10th to decedent and wife) in 1925.

Mrs. Catherine B. Ferry stated to me that she never inherited any property or contributed any separate funds or property to any of the afore said trusts.

For the purpose of this tax it is therefore recommended that all of the transferred property was vested in decedent and is not recognized as community property.

First I will dispose of the gift of the 476 shares of common stock in the First National Bank at Glendale, a gift to Peter Leo Ferry, son of decedent, on December 8, 1934 as set forth on page 2, of rider under Schedule "E", of form 706.

It appears from the statements to me by Peter Leo Ferry, James L. Ferry and Catherine B. Ferry that this stock was given to the said Peter Leo Ferry, by the decedent, out of his block of stock in said bank in order to induce him to remain as an employee of said bank and not leave the bank as he intended to do. The stock was delivered in person to said son on the date named above and he at all times has had possession of it. The stock has never paid a dividend and was transferred of record in stock book of said bank at time of gift.

Said bank stock at time of gift was selling at \$10.00 per share according to Mr. McMahon the manager, and

(Defendant's Exhibit D)

the total value of the gift was \$4,760.00. Said bank was a new bank reorganized in 1934 from another bank which closed its doors in 1933.

Estate of Peter Ferry

Schedule "E" (Cont'd.)

Decedent was a director of this bank and retained 100 shares of its stock. See Item 35 of Schedule B. At date of decedent's death this stock was valued at \$12.50 per share or a total of \$5,950.00.

In my opinion the facts are correctly stated in form 706 as to the motive for this gift and in my opinion is sufficient rebuttal of the presumption of the Estate Act of 1932, Sec. 803, (c). The fact that the value of said gift was not a material part of decedent's estate, is another reason why I recommend this gift not taxable.

Attached to form 706 are two copies of inventories and values of the six trusts as set up from the trustees records, as verified by myself and Preston H. Leslie, State Inheritance Tax Appraiser. Certified copies of said trusts are also attached to form 706. Values of all six trusts assets as of date of decedent's death are recommended as follows: (Appraiser Leslie spent many weeks in his valuation work and is a most reliable appraiser.)

Following Leslie's Appraisal Report, trusts are numbered 1 to 6 and assets of each trust are given each numbered item.

1. Citiezn's National Trust & Savings Bank
of Los Angeles. Trust No. 2012
Not returned \$82,289.16

(Defendant's Exhibit D)

Mr. Leslie's valuation is \$81,918.01. All sub-items 1 to 22 as numbered by me commencing with "cash" Item 1 are correctly described and the only difference in Mr. Leslie's total is the accrued interest shown in column one, on the notes, is not extended by him, and is included in my total, except as to sub-items 9, 16 and 17.

All items of notes, are recommended at their full face value plus accrued interest except Item 9, Harry G. McBain Corporation note of \$7,400.00 is recommended at \$1,000.00 and the accrued interest at nil. Mr. Miller trust officer stated that the said McBain Corporation is not financially responsible, that said note is a renewal of originals in 1925, and that the security is not worth in excess of \$1,000.00 that they would be glad to take \$1,000.00 for the note and all interest due. Sub-items 16 and 17 are recommended at \$1.00 each because the security is a second lien on property not worth the first mortgage.

Estate of Peter Ferry

Schedule "E" (Cont'd.)

Error in bond interest.

The bonds sub-items 18 to 22 were valued by Dulin & Company, Los Angeles, at market and are so recommended. An error in accrued interest in sub-item 18 is corrected to read \$48.11 instead of \$46.96.

Item 2. Citizens National Trust & Savings

Bank of Los Angeles, Trust #6204

No returned

\$195,850.37

This trust consists entirely of real estate, 38 parcels in all numbered 1 to 38 by me and the values as extended in

(Defendant's Exhibit D)

Mr. Leslie's appraisal are recommended without change, except taxes a lien are deducted in the sum of \$3,374.63 which were verified from paid tax bills.

I have inspected all parcels, of value over \$5,000.00, except the Fresno County parcels sub-items 35 and 36, and which are valued at \$80,000.00 and \$6,000.00 respectively. These two parcels were not inspected because they were appraised by Mr. Wakefield an expert appraiser of Fresno, appointed by the Court and are believed to be full value, and the further reason that the expense of a trip to Fresno, over 200 miles, appears not justified. Most of the property is located in Glendale and Los Angeles, and I consulted R. L. Anderson and L. H. Wilson, realtors and expert appraisers of Glendale as to the values of all items over \$5,000.00 and in no case did they fix a value in excess of the values fixed by Mr. Leslie, but were practically the same. I fully concur in Mr. Leslie's values and recommend their acceptance. Most of the property was unimproved and there were no accrued rents.

Total gross value of trust	\$199,225.00
Less taxes a lien 6/16/35	3,374.63
Net recommended	<hr/> \$195,850.37

3. Security First National Trust & Savings Bank. Trust No. SS-4358 & No. SS-4358-A Not returned. \$95,182.02

This trust consists of sub-items numbered 1 to 35 by me, and the values recommended are those fixed by Mr.

(Defendant's Exhibit D)

Leslie, on the basis of full market value plus accrued interest. All securities were appraised by Dulin & Company, Los Angeles reliable Bond Brokers, and after a careful check are recommended as extended.

Estate of Peter Ferry

Schedule "E" (Cont'd.)

The trust deed notes sub-items 19 to 31 inclusive are recommended in the full amount of principal balance plus accrued interest to date of death, except as to one note of Mary A. McCann, and no interest is recommended because of default and the trustees state the security not worth over the amount of principal due. All participating certificates are grouped as one sub-item 3-31 and underlying security foreclosed are grouped as sub-item 3-32; said three notes under sub-item 32 are recommended at the market value of the security taken in foreclosure on said notes.

Sub-Item 33 is cash on hand.

Sub-Items 34 and 35 are set up as the assets of Trust No. SS-4358-A which is not a separate trust but a supplemental account consisting of a piece of real estate foreclosed on, valued at \$1,900.00 and cash on hand of \$26.73.

Total value of this trust	\$95,225.86
Less taxes a lien 6/16/35	43.84
	<hr/>
Net value recommended	\$95,182.02
4. Security-First National Trust & Savings Bank. Trust No. S-5869 Not returned	\$108,363.36

This trust was valued at a total of \$107,254.91 by Mr. Leslie. The difference being mainly due to the difference

(Defendant's Exhibit D)

in the valuation of Item 1, fixed by Dulin & Company, and records of this office's Stock and Bond Desk.

4 sub-1. \$9,775.00

accrued interest 28.75

Hartley Rogers & Co. L. A. 7/1/35 Bid
85, Ask Nil. Recommended at 85.

4 sub-2. \$3,288.75

accrued interest 25.00

N.Y.S. Ex. mean of sales @ 109 $\frac{5}{8}$ is
recommended.

Estate of Peter Ferry

Schedule "E" (Cont'd.)

4 sub-3. \$4,695.00

accrued interest 52.50

N.Y.S. Ex. sales at 117 $\frac{3}{8}$ is recommended.

4 sub-4, 5, 7 to 10, incl. \$15,253.42

Recommended as set forth in Leslie's report, as appraised by Dulin & Company, at the full market value, plus accrued interest.

4 sub-6. \$5,356.25

accrued interest 10.42

N.Y. Curb 6/22/35 mean of sales @ 107 $\frac{1}{8}$ is recommended

4 sub-11. \$2,102.50

accrued interest 45.84

N.Y. Curb, week end 6/22/35 mean of sales at 105 $\frac{1}{8}$ is recommended.

4 sub-12. \$3,097.20

accrued interest 22.75

(Defendant's Exhibit D)

N.Y.S. Ex. mean of sales @ 103.24 is recommended.

4 sub-13 to 21 incl. \$64,609.98

All these remaining items were valued by Dulin & Company and are recommended as set forth in Leslie's appraisal.

5. Title Guarantee and Trust Co. Trust No.

S-1080 a 1/10th, interest Not returned \$2,547.74

This trust corpus consists of a 1/10th, interest in certain lots and acreage in Glendale, appraised at \$2,695.00 by Mr. Leslie. I viewed the said property and checked the valuation, and according to L. H. Wilson, realtor in Glendale, and expert appraiser is fully valued at \$26,950.00 for the whole interest. Said property is industrial property and is occupied by James L. Ferry with his machinery equipment rental business. The inventory of lots and acreage is correctly set forth in Leslie's report as verified by me from the Trust records. Taxes a lien on decedent's 1/10th interest was \$147.26, deducting this from \$2,695.00 leaves a taxable interest of \$2,547.74.

Estate of Peter Ferry

Schedule "E" (Cont'd.)

Taxability:

Decedent contributed all the money which went to purchase a 1/10th interest in this trust property. Title was taken as joint tenants with his wife Catherine B. Ferry on July 11th, 1925. See assignment of original Trust #1080 attached to form 706 with other Trusts reported herein.

(Defendant's Exhibit D)

On May 28th, 1935 decedent transferred to Mary Alice Diener, James L. Ferry and Peter L. Ferry, Jr., his interest in the aforesaid joint tenancy property without consideration.

While this transfer was of small value it is recommended as taxable because transferred within 18 days of decedent's death, when he was seriously afflicted with cancer and was more than normally apprehensive of death, and was therefore made in contemplation of death.

A copy of the death certificate is attached, marked Exhibit B, I interviewed Dr. Jas. F. Percy, who signed the death certificate and he stated that he attended the decedent from May 28, 1935 to date of death; that on May 28, he found the decedent in the last stages of disease from cancer on the neck, under right jaw; that he operated on the decedent June 11, 1935 but the case was hopeless.

I interviewed Dr. Norman Paine, of Glendale decedent's physician from July 17, 1933 to April 26, 1935. At the time of his first visit on July 17, 1933 decedent had a tiny growth under right jaw, but it was not definitely diagnosed as cancer until August 29, 1934 when it was removed. Dr. Paine stated that decedent went to Savannah, Ga., for treatment in July 1934 and had several operations; decedent returned home Jan. 9, 1935 and appeared O.K.; later in April the case became serious, but he was quite sure the decedent believed he would get well up to April, 1935. Dr. Paine did not treat the decedent after April 26, 1935.

James L. Ferry and Catherine B. Ferry both stated that decedent's trouble was not considered serious until about April of 1935, that he was about attending to his affairs and fully believed he would get well.

(Defendant's Exhibit D)

6. Title Guarantee and Trust Co. Trust
P-1052 Not Returned \$126,604.80

Sub-1 to 42. All but the last four sub-items consist of Notes secured by real estate and all are set forth in Les-Estate of Peter Ferry

Schedule "E" (Cont'd.)

lie's appraisal at the full amount of principal balance due plus accrued interest to date of decedent's death. The last four sub-items are street bonds which are valued at the amount of balance due which according to Tromperter & Company, Street Bond Dealers is a maximum value. Total value of Trust \$126,628.85. Taxes a lien \$24.05 leaves a net value of \$126,604.80 recommended.

All items have been checked with the Trust records and are recommended as set forth in Leslie's appraisal.

Terms and Taxability of Trusts (not discussed above)

1. Name and Number: Citizens National Bank & Savings Bank, Trustee No. 2012 dated 4/7/25. Amended 3/30/29 to include Patrick Robert Ferry a beneficiary with other children.

Beneficiaries:

1. Trustor, wife and 7 children income for life; one child already deceased.
2. Widow to take trustor's share of income.
3. If children die before one of parents, issue get share, if none, parents.
4. Death of both Mr. and Mrs. Ferry, income to children "or their heirs" (probably meaning issue).

year

(Defendant's Exhibit D)

5. Mary O'Brien, \$300.00 per month for life, prior charge against Trust.
6. When parents are both deceased:
 - (a) Boys get their full share until 40 years; if not 40, 1/3rd when 30 years and 1/3rd when 35; balance when 40.
 - (b) Daughter; her share to remain in trust for life, on death to estate.

Revocability: First paragraph, top page four.

This Declaration of Trust may be revoked, modified or amended upon the written order of Peter L. Ferry and Catherine B. Ferry, and any three of the remaining beneficiaries hereunder.

Estate of Peter Ferry

Schedule "E" (Cont'd.)

2. Name and number: Citizens National Trust & Savings Bank, Trustee. No. 6204. Dated June 5, 1930.

Beneficiaries:

1. Trustors jointly for life, (decedent and wife.) and the survivor.
2. On survivors death, then to children, etc .

Revocability: Article XI.

"It is a further provision of this trust, that said Trustors have reserved, and said Trustees does hereby assent to, the express right and power reserved unto said Trustors during their joint lives and acting jointly, and

(Defendant's Exhibit D)

upon the death of either of them then to the survivor acting jointly with two of the Children of Trustors, herein named beneficiaries, to revoke in whole or in part this trust at any time by notice of revocation in writing, addressed and delivered to said Trustee and executed by the required parties above stated:" . . .

3. Name and Number: Security-First National Bank,
Trustee No. SS-4358. Dated
10/9/25

Beneficiaries:

1. Income to Trustor, wife and 6 children for life.
2. Share of Trustor to widow.
3. During minority of children, share to widow.
4. Mary O'Brien shall receive \$300.00 for life, first charge.
5. On death of husband and wife.
 - (a) Daughter, share for life; on death, to issue, if none, to survivors.
 - (b) Six sons: $\frac{1}{3}$ when 30, at 35 an additional $\frac{1}{3}$, and balance until death.

Estate of Peter Ferry

Schedule "E" (Cont'd.)

Revocability: Article IX

"It is an express condition of this trust that the same is hereby made absolute and irrevocable except as to the power reserved in the trustor to make modifications therein during the lifetime of the trustor, Peter L. Ferry, such modification or modifications to be effective only with the

(Defendant's Exhibit D)

consent of the majority of the beneficiaries under this trust. After the death of the trustor, Peter L. Ferry, the above power to modify this trust shall cease and terminate.

Article X

"It is a further provision of this trust that the said trustors have reserved unto themselves and a majority of the beneficiaries, the right, at any time upon written notice delivered to the said Trustee, to alter and change the terms and conditions of this trust as well as the beneficiaries therein named and such right shall be effective immediately upon the receipt of said notice by said Trustee except in so far as such alteration or changes would affect the term of the preceding paragraph hereof making the said trust absolute and irrevocable."

4. Name and Number: Security Trust & Savings
Bank. Trustee, No. 5869.
Dated 2/10/25

Beneficiaries:

1. Mary O'Brien for life.
2. Balance husband and wife and children.
3. During minority of children, to widow.
4. Surviving spouse gets share of deceased spouse in income.
5. When husband and wife both die, trust passes to children—
 - (a) Son when 40, $\frac{1}{3}$ when 30 and $\frac{1}{3}$ when 35;
 - (b) Daughter for life, then to issue.

(Defendant's Exhibit D)

Estate of Peter Ferry

Schedule "E" (Cont'd.)

Revocability: IV (page 4).

"It is an express provision of this trust that there has been reserved the right (to which reservation the Trustee hereby assents) in the Trustor, Peter L. Ferry, to revoke and terminate this trust, in whole or in part, at any time during his life, by a notice of revocation in writing, signed by him, and addressed and delivered to the Trustee at its Trust Department at its Head Office, in Los Angeles, California, not less than thirty (3) days prior to the taking effect of such revocation, providing that a majority of the living beneficiaries (including each of the Trustors) who at that time are entitled to receive income from this trust and who are under no disability, shall consent in writing to such revocation."

6. Name and Number: Title Guarantee and Trust Co. Trustee No. 1052.
Dated 11/2/25 Amended
March 30, 1930 to include
Patrick Robert Ferry, born
3/17/29, a beneficiary.

Beneficiaries:

1. Mary O'Brien, \$25.00 a month for life.
2. Mrs. Ferry and husband for life.
3. On her death all income to children.
4. Sons get share when 40, 35 and 30.
5. Daughter for life, and then to issue.

(Defendant's Exhibit D)

Revocability: Fifth

"It is an express provision of this Trust that the same is and shall be absolute and irrevocable except that said Trustors have reserved unto themselves and a majority of the Beneficiaries the right at any time upon written notice delivered to said Trustee, to change the time of payment and/or the proportion of income, and/or the Beneficiaries mentioned in Article Four of this Trust,

Estate of Peter Ferry

Schedule "E" (Cont'd.)

and such change shall be effective immediately upon receipt of said written notice by said Trustee".

Discussion of taxability of Trusts 1, 2, 3, 4 and 6.

The Supreme Court's opinion in *Helvering v. City Bank Farmers Trust Co.*, U. S. 296 - 85, 16 A.F.T.R. 981, fully sustains the view that because decedent had the power to revoke in conjunction with any one of the other settlers, even though a beneficiary, the statute validly taxed it as a part of the gross estate.

It appears that this decedent, Peter L. Ferry in all of the above trusts held the power to revoke and change the terms of income, in conjunction with others.

The Revenue Act of 1926, Sec. 302 (d), provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of death of all property, real or personal, tangible or intangible, wherever situated

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where enjoyment thereof was subject at the

(Defendant's Exhibit D)

date of death to any change through the exercise of a power, either by the decedent alone or on conjunction with any person, to alter, amend, or revoke”.

The section was first introduced into the Revenue Act of 1924, and reenacted in that of 1926.

Peter L. Ferry created four trusts, Nos. 2012, SS-4358, 5869 and 1052 in the year 1925, and one trust, No. 6204 in 1930. In the language of Mr. Justice Roberts, “He was therefore upon notice of the laws’ demand, and there can be no claim that the statute is retroactive in its application to his transfer.

On the determination that these trusts are revocable trusts, all are recommended as a taxable part of the decedent’s estate.

It must be noted that IF those trusts which were created in the year 1925 (Trusts No. 2012, SS-4358, S-5869 and 1052) are determined as irrevocable trusts then the executor of this estate is *amendable* to a Gift Tax return now delinquent ELEVEN years.

Estate of Peter Ferry

Schedule “E” (Cont’d.)

It is also to be noted that decedent must have been in that frame of mind that would cause one to make testamentary disposition of his property for the reason he transferred his entire estate, except some real estate of practically no value, some street bonds, and other personal property to the value of only a total of \$9,909.60 (his probated estate). And he transferred property valued at date of death at \$610,837.45 without any consideration in money or moneys worth.

(Defendant's Exhibit D)

Except as to the transfer made in 1935 I am reasonably satisfied that the physical condition of decedent was not a factor or governing motive. He was relatively a young man when said trusts were made and in vigorous health up to about 1933 or 1934. Notwithstanding his physical condition I am of the opinion that said transfers recommended herein for tax were made in contemplation of death or in lieu of testamentary disposition. He made a will, dated May 10, 1930 but left practically no estate to pass under said will, practically his entire estate was given to these subject to his bounty as if by will.

SCHEDULE "H"

Total	\$14,126.18	\$9,909.60
Deductions: (See explanation below)		
Funeral Expenses	614.11	614.11

Recommended in the sum expended as verified from filed vouchers.

Executor's Commission	409.38	500.00
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Affidavit requested, not yet secured. Will be forwarded when received. Allowance of \$500.00 recommended as it will make no change on account of limited deductions allowable.

Attorneys' fee	\$ 409.38	\$ 500.00
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The Attorney's affidavit is attached, Marked Exhibit "D" showing \$500.00 was paid in 1936, \$250.00 each to Freston & Fibs and James E. Collins, which sum is approximately the statutory fees and is recommended. The additional sum of \$1,000.00 would be extraordinary and is not recommended.

(Defendant's Exhibit D)

Estate of Peter Ferry

Schedule "H" (Cont'd.)

Miscellaneous Expense	\$ 1,820.27	\$ 181.75
Taxes of \$45.81 is correctly set up on rider and was a lien at date of death, a proper deduction.	\$ 45.81	\$ 45.81
1. Personal property taxes	65.96	65.96

This was the tax a lien on the furniture in decedent's home, a proper deduction.

Items 2, 3, 4 and 6.	\$ 58.50	\$ 58.50
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These items are correctly returned as proper deductions, and reasonable court costs.

Item 5.	\$1,000.00	Nil
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This appears to be an expense of the beneficiaries and not an expense of administration because said trusts were not a part of the probated estate.

Item 7.	\$ 640.48	\$ 11.48
Appraisers fees on probated estate was	\$ 11.98	
" " " trust property was	628.50	

Total	\$ 640.48	
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This sum was approved by the Court and was paid.

Appraiser's fee on probated estate only is recommended deductible.

Taxes returned on rider a lien of Trust property has been allowed as a proper deduction from the gross value of the said Trusts in my report above, and may be disregarded here.

(Defendant's Exhibit D)

Estate of Peter Ferry

SCHEDULE "I"

Total	\$10,876.01	\$9,876.01
Item 1.	1,000.00	Nil

This doctor bill was paid by Jas. L. Ferry, on June 10, 1935, his personal check. Recommended not allowable.

1 to 13, incl.	\$ 912.22	\$ 912.22
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The executrix Catherine B. Ferry filed a claim for these items which was approved by the court and all have been paid. All are recommended as proper deductions.

14.	\$ 7,289.59	\$7,289.59
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This claim of Frank Diener was filed in probate for the sum returned and was approved. Said claim was made up of a long list of items of expenses, incurred by the said Frank Diener (Decedents' son-in-law) and in accordance with Decedent's instructions, on the ranch in Fresno County. Said ranch is taxed herein as Sub-Item 36 in Trust No. 6204. It appears that this is a personal liability of the decedent and is recommended as deduction.

15.	\$ 1,674.20	\$1,674.20
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This note is correctly described in form 706 as verified from an inspection of said note in probate files. No endorsements.

It appears that decedent acquired a certain improved lot which was encumbered by a mortgage for \$1,500.00 held by the Pacific States Savings & Loan Company and James L. Ferry, had some paid up certificates of deposit in said Loan Company, which the Company was barred from paying in cash, due to the Building & Loan Moratorium, but

(Defendant's Exhibit D)

were permitted to exchange said certificates for mortgage notes. Decedent gave this note to James L. Ferry and he turned in \$1,500.00 of his paid up certificates to the Loan Company and the mortgage on decedent's lot was cancelled. The loan was bonafide and for full consideration in money to the decedent and is recommended as a proper deduction.

Under the Max Fertig case decision, it is recommended that the total deductions allowable cannot exceed the total sum of the Gross Estate Probated. Total probated estate was \$9,909.90 and only to this extent is recommended all the deductions Schedule H and I.

Estate of Peter Ferry

Schedule "I" (Cont'd.)

Specific Exemption. Decedent was a resident.

Proof of Inheritance Taxes paid. The sum of \$5,000.00 has been paid on account on 12/14/35 but the amount has not yet been fixed by the Court. Proof has been requested and will be forwarded to the Bureau when finally determined.

The Executor through the estates attorney has been advised of the recommendations in my report and a waiver requested.

The Attorney stated there was no objection to my recommended values, but was not in a position at this time to agree to the taxability of the trust, that it was a matter of the law involved. He asked for an early review of the case by the Bureau.

Respectfully,

Nat N. Eddy
Internal Revenue Agent.

(Defendant's Exhibit D)

* * * * *

Int. Rev. Agt.

March 28, 1938.

MT-DC-ET-7738-Sixth California

Estate of Peter Ferry

Date of death—June 16, 1935

[Stamped]: Received Apr 5, 1938 Internal Revenue
Agent in Charge Los Angeles Division

CONFERENCE MEMORANDUM

Memorandum for H. K. Melcher, Head,
Estate Tax Division

A hearing was held in this estate on March 23, 1938. Mr. L. A. Luce, acting under a power of attorney, represented the estate at the hearing. O. L. Bowen of the Appeals and Review Section represented the Government.

One of the issues raised was whether or not a joint life estate in property transferred prior to the enactment of Section 161 (a) of the California Code giving the wife a vested interest in the community, is taxable as to the entire corpus where the trust instrument names the wife as one of the trustors and reserves the right in either with the consent of the other to revoke the trust. Upon the death of the survivor of the husband and the wife the trust corpus was to be distributed to the then living children, or their lawful living issue.

The same issue is raised with respect to trusts created by the donor and his wife wherein the income was pay-

(Defendant's Exhibit D)

able to beneficiaries other than the trustors, with the power reserved to trustors to alter, amend or revoke the trust with the consent of the other and all of the remaindermen with respect to several of the trusts, and with the consent of less than all of the remaindermen in the others.

The corpus of all five of the trusts was acquired by the decedent during coverture prior to the enactment of Section 161 (a) of the California Code giving the wife a vested interest in the community. Prior to the passage of Section 161 (a) of the California Code the wife had a mere expectancy in the community, and the property rights of the husband during the life of the community were so complete that the husband was the owner of the community. *U. S. v. Robbins*, 269 U. S. 315. The signing of the trusts, therefore, by the wife as one of the trustors is of no significance as she contributed nothing of her own to the trusts.

The estate contends that the legal effect of the wife signing the trusts as a trustor was to make her a tenant in common with the husband. An estate of tenancy in common may have been created upon revocation of the trusts because the trust instruments recited that in the event of revocation the property constituting the trust became the property of the trustors. None of the trusts, however, were revoked and the wife, therefore, acquired no more interest in the property than she had at their creation.

(Defendant's Exhibit D)

2—Estate of Peter Ferry

The wife having contributed nothing to the trusts, and having no interest in the trust property other than the life estate given her in certain of the trusts, the property of all five trusts are subject to the tax because of the reserved power in the husband to alter, amend, and revoke the trusts although such revocation could be made only with the consent of those having a substantial adverse interest in the property. Regulations 80 (1937 Edition) Article 20 (a) provide that all trusts are subject to tax—"When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 P. M. Eastern Standard Time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936) and the decedent's death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest." See also *Helvering v. City Bank Farmers Trust Company*, 56 Sup. Ct. Rep. 70.

A ninety-day letter should issue in the case.

.....
Head, Appeals and Review Section.

OLB/VRL

* * * * *

(Defendant's Exhibit D)

REOPENED CASE
ESTATE TAX MAJOR REPORT

MT-ET-6-Calif. Los Angeles, Calif.
Estate of: Peter Ferry February 5, 1940.
Date of Death: June 16, 1935
Deficiency Tax Recommended: \$848.93.
Internal Revenue Agent in Charge,
Los Angeles, California.

Having completed my investigation of the return, Form 706, for the estate named above, as directed by your letter dated October 23, 1939, I herewith submit the following report:

Executrix: Catherine B. Ferry,
c/o Claude I. Parker and
Ralph W. Smith,
808 Bank of America Bldg.,
Los Angeles, California.

Attorney: Claude I. Parker and
Ralph W. Smith,
808 Bank of America Bldg.,
Los Angeles, California.

Forms 704 and 706 used and returned. Form 722 enclosed.

Inheritance Tax Proof requested as stated.
Waiver not necessary.

Exhibit attached: A

Details of My Report Follow:

hms

(Defendant's Exhibit D)

Estate of Peter Ferry

This is a claim for refund.

Assigned to me under date of October 12, 1939 and was prepared by J. E. Blum, with Claude I. Parker and Ralph W. Smith, tax counsel for the executrix, Catherine B. Ferry.

On October 23, 1939, I contacted Mr. Blum and requested him to furnish me with proof that decedent's wife contributed any community funds to the acquisition of insurance policies, and any other data pertinent to this claim, and he said he would get it out to me in a week or 10 days. Subsequently I contacted Mr. Blum requesting said data, on November 2, November 27, December 4, December 20, 1939, and on January 3, January 12 and February 5, 1940, and he always made excuses that he did not have the data available. On January 12 Mr. Blum wrote me a letter promising the data on the 26th. On this date above written I inquired if he had the data ready and he said he had been unable to get it out and did not know when he could.

In view of the above failure, after a reasonable time having elapsed, to submit further proof and data on this case I have to recommend the refund be denied.

The claim contends that the six trusts are taxable only to the extent of one-half because of the community interest of the decedent's wife, being a vested interest, from a property settlement, at the time said trusts were created.

The Bureau has sustained my report on the taxability of these trusts and I have nothing further to offer, except to recommend the claim be denied.

(Defendant's Exhibit D)

The claim also contends that the life insurance policies should be not taxed in full but an allowance be made of the claimed community interest stated to be vested in decedent's wife. No evidence being furnished to prove said community interest, it is recommended the claim be denied.

In all counts in this claim I refer to my report in this case dated January 30, 1937 which was sustained by the Bureau con-

Estate of Peter Ferry

feree. Mr. Blumm has advised me that proof of payment of the further sum of \$848.93 (the deficiency tax recommended herein) to the State of California will be sent in as soon as possible. Receipt of this proof will leave no deficiency.

NAT. N. EDDY,
Internal Revenue Agent.

February 20, 1940.

MT:ET

District of 6th California

Estate of Peter Ferry

Date of death: June 16, 1935

[Stamped]: Registered 672349 Return Receipt Requested. Fee Paid 3 cents.

Catherine B. Ferry, Executrix,

c/o Claude I. Parker

808 Bank of America Building,
Los Angeles, California.

(Defendant's Exhibit D)

Madam:

The examination by this office of the estate tax return of the above named estate, in connection with your claim for refund of \$63,825.77 indicates that the adjustment of tax liability shown in the accompanying statement is warranted.

If You Agree to the adjustment shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the deficiency in tax and to stop the accumulation of interest. Such interest will cease thirty days after the receipt of the executed form, or upon the payment of the deficiency in tax to the Collector, whichever occurs first.

If you desire to make immediate payment of the deficiency in tax without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at Los Angeles, California, enclosing this letter, or a copy thereof. Interest on the deficiency in tax should be included in your remittance, computed at the rate of six per cent per annum from the due date of the tax to the date of payment.

If You Do Not Agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with this office, within thirty days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency against the estate. This letter is not a final notice

(Defendant's Exhibit D)

Estate of Peter Ferry

of deficiency nor of disallowance of your claim, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed statement.

Should you fail to pay the deficiency in tax to the collector of internal revenue or to file with this office within the thirty-day period mentioned either a waiver on the enclosed form or a written protest, final determination of your tax liability will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of estate tax deficiencies, and the disallowance of your claim will be recommended.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

Internal Revenue Agent in Charge.

Enclosures:

Statement.

Form of waiver.

Form of acknowledgment.

(Defendant's Exhibit D)

MT:ET

District of 6th California

Estate of Peter Ferry

Date of death: June 16, 1935

STATEMENT

Since no evidence has been furnished which would definitely establish the claim for deduction for community property, the following determination is proposed:

	Prior Determination	Proposed Determination
Gross estate,	\$931,863.04	\$931,863.04
Deductions, 1926 Act,	109,909.60	109,909.60
Net estate, 1926 Act,	821,953.44	821,953.44
Net estate, 1935 Act,	871,953.44	871,953.44
Gross tax, 1926 Act,		36,036.74
Credit for estate and inheritance taxes,		27,980.46
Net tax, 1926 Act,		8,056.28
Total taxes, 1926 and 1935 Acts,		149,588.36
Gross tax, 1926 Act,		36,036.74
Net additional tax,		113,551.62
Net tax, 1926 Act,		8,056.28
Total net tax,		121,607.90
Total tax assessed and paid,		120,758.97
Deficiency,		848.93

(Defendant's Exhibit D)

CREDIT

Credit for State estate, inheritance, legacy or succession taxes is allowed in the amount of \$27,980.46. This is the total amount in respect to which the evidence required under Article 9 of Regulations 80 has been submitted. Kindly advise when the additional evidence, if any, may be expected.

If the full eighty per cent credit is allowed, it will eliminate any deficiency from this estate which is due entirely to the tentative disallowance of \$848.93, the amount for which evidence of payment may be furnished.

* * * * *

STATEMENT OF PROTEST

With Respect to Deficiency Claimed in Federal Estate Tax Proposed to Be Assessed Against Catherine B. Ferry, Executrix of the Estate of Peter Ferry, Who Deceased June 16, 1935; and

STATEMENT OF PROTEST

With Respect to Proposed Action on Claim for Refund Filed by Executrix of the Aforesaid Estate.

Los Angeles, California,
April 5, 1940.

Hon. Guy T. Helvering,
Commissioner of Internal Revenue,
Washington, D. C.,

Through the Office of the Internal Revenue Agent
in Charge,
Los Angeles, California.

(Defendant's Exhibit D)

Sir:

Receipt is acknowledged of your letter bearing date February 20, 1940, carrying symbols MT-ET, bearing signature of George D. Martin, Internal Revenue Agent in Charge, which letter authorizes taxpayer, if dissatisfied with the tentative decision of the Commissioner of Internal Revenue therein made, to file within a period of thirty days her protest.

Receipt is also acknowledged of your letter bearing symbols above given, in which the time for filing said protest is extended for a period of fifteen days or, to wit, until the 5th day of April, 1940.

* * * * *

CERTIFICATE

I hereby certify that the foregoing protest was prepared by me for and on behalf of taxpayer; that the facts recited in said protest are the exact facts as given to me by the taxpayer and to the best of my knowledge and belief are true and correct.

Dated at Los Angeles, California, this 5th day of April, 1940.

J. EVERETT BLUM

With Claude I. Parker and Ralph W. Smith
808 Bank of America Building,
Los Angeles, California.

(Defendant's Exhibit D)

MT-ET-California

Estate of Peter Ferry

Date of death: June 16, 1935.

Los Angeles, California

Jun 19 1940

REPORT OF HEARING

Internal Revenue Agent in Charge,

Los Angeles, California.

As a result of Office tentative thirty-day letter dated February 20, 1940, a protest was filed in this office by the above named estate on April 4, 1940. No formal hearing was had.

Appearances:

For the Government: N. A. Burkey, Internal Revenue Agent.

For the Estate: J. Everett Blum and Ralph W. Smith, Attorneys of the Law Firm of Claude I. Parker. (With power of attorney and permits to practice.)

The estate filed claim for refund in the amount of \$63,825.77. It based its claim on increase in valuation of insurance policies over the values claimed when the estate tax return was filed, and the inclusion in the gross estate for tax of certain transfers in trust.

It appears by the record that in filing Form 706, the estate disclosed a tax in the amount of \$16,905.17; that as a result of field investigation a deficiency in estate tax was tentatively determined as appears by thirty day letter dated August 4, 1937; that the substantial part of the deficiency was caused by the disallowance of a claimed community interest in the life insurance policies and the

(Defendant's Exhibit D)

inclusion in the gross estate of transfers in trust not returned by the estate for tax; that the estate filed a protest to the tentative determination with the Bureau whereby it objected to the disallowance of the community claimed and the inclusion in the gross estate of the trusts; that a hearing was

Estate of Peter Ferry.

had on the protest in the Bureau on December 16, 1937, and March 23, 1938, as appears by reports thereof in the file; that as a result of the hearing on December 16, 1937, the Bureau wrote a letter, dated January 22, 1938, a copy of which is in the file, in which it was proposed that there be eliminated a transfer valued at \$5,950.00 covering the transfer of 476 shares of First National Bank of Glendale, and additional deductions were allowed; and that as a result of the various conferences the estate paid the deficiency tax which it now seeks refunded.

The claim of the estate was the subject of field investigation, report thereof being in the file. As a result of the report this office issued its letter under date of February 20, 1940, showing a deficiency in the amount of \$848.93. To this letter the estate has filed its protest.

The protest was set for hearing at 10 A. M., Tuesday, May 21, 1940. At that time Mr. Blum asked that it be continued until the 22nd. His request was granted, but on the 22nd he called by telephone stating that he desired the case to be considered on the record as submitted, waiving formal hearing.

(Defendant's Exhibit D)

In reference to the community interest of the wife claimed in the life insurance policies, it appears at the time of major investigation, and when the matter was under consideration by the Bureau, the case of *Newman v. Commissioner*, 76 Fed. 2d 449, and *Bank of America v. Commissioner*, 34 B.T.A. 684, affirmed by the Ninth Circuit Court of Appeals, was the law governing life insurance policies on the husband decedent, premiums thereon having been paid by community property. The law now applicable is the case of *Lang v. Commissioner*, opinion of the Supreme Court entered May 16, 1938, and the estate of *McCoy v. Commissioner* promulgated by the Board of Tax Appeals April 25, 1939, to which the Commissioner acquiesced in Internal Revenue Bulletin, Vol. 35, 1939 Edition, dated April 28, 1939. These cases established the rule of law that where it be shown that premiums on life insurance policies are paid from community funds, that the community rights attach to the proportion that the community funds paid bear to the whole premiums paid and, with particular reference to the California community property law, the community payments are to be from that type of community acquired after July 29, 1927, the effective date of Section 161 (a) of the California Code. The law on that matter being settled, the only issue on this point in this case is one of fact, i.e., did the wife make contributions to these insurance policies through payments of premiums by community acquired after July 29, 1927?

(Defendant's Exhibit D)

Estate of Peter Ferry.

The report of investigation on this issue states that the investigating officer was unable to obtain satisfactory proof upon which any concession could be made to the claim for refund on account of community contribution.

The only evidence submitted for consideration by the estate on its protest is the sworn statement contained in the protest itself that there were community earnings after July 29, 1927, and that the husband and wife each had separate earnings, and that all the earnings, including community income, were deposited in a joint bank account from which all bills were paid.

Such evidence falls far short of proving that earnings of the husband, as distinguished from all incomes of whatever nature, actually were used for the payments of premiums on these life insurance policies during the years they were asserted to have been so paid.

If it be proven that a part of the wife's separate funds were used for the payment of these premiums no benefit could be given the widow as Ferry died after Article 25, Regulations 80 (1934 Edition) was promulgated.

It is recommended that the claim for refund be denied on the community issue.

In reference to the taxability of the trusts, it appears by the conference memorandums dated December 23, 1937, and March 28, 1938, hereinabove mentioned that the issues raised by the claim for refund and this protest have been carefully considered. There has been no change in the law occurring since these memorandums were issued coming within the knowledge of the writer. The pertinent points of these trusts, in so far as they

(Defendant's Exhibit D)

are brought within the terms of Section 302 (d) of the Revenue Act of 1926, as amended, are fully covered in the report dated December 23, 1937, and it is wholly unnecessary to again restate the provisions.

The law as interpreted and applied by the writers of the two Bureau conference memorandums is supported by the recent case of Colonial Trust Company (Estate of Thomas I. Walker) v. Commissioner, reported in Vol 4—1940 C.C.H., Page 10,103, a decision of the Circuit Court of Appeals for the Second Circuit, decided May 6, 1940.

Estate of Peter Ferry.

It is recommended that the claim for refund and the protest be likewise denied on this issue.

In the protest it is asked that deductions be allowed in full rather than be limited to the amount of the probate estate. No proof in support of additional claimed deductions other than this statement in the protest was submitted. It is, of course, the present rule that deductions are not limited to the amount of the probate estate. It appears by Bureau letter dated January 22, 1938, in the file, that deductions in addition to those allowed by thirty day letter were allowed.

The representatives of the estate desire a hearing before the Staff.

Submitted herewith is protest, copy of power of attorney and request for hearing before the Staff.

N. A. Burkey

Internal Revenue Agent.

NAB:an

Enclosures.

(Defendant's Exhibit D)

June 25, 1940.

MT:ET:7738

District of 6th California

Estate of Peter Ferry

Date of death: June 16, 1935

Commissioner of Internal Revenue,
Washington, D. C.

Reference is made to Bureau letter dated June 21, 1940, requesting advise as to what progress has been made relative to the investigation of a claim for refund in the above named estate which was transmitted to this office under date of August 30, 1939.

Please be advised that the claim was assigned for investigation to Internal Revenue Agent Nat N. Eddy, and a report thereon was submitted under date of February 5, 1940. A preliminary notice was issued on February 20, 1940, and a protest filed on April 4, 1940.

Action on this protest was continually delayed due to the failure of the representatives of the estate to appear and present evidence in support of their protest. An informal hearing was held in this office, and finally the representatives of the estate advised that the case be considered on the record as submitted and a formal hearing was waived.

The conferee's report of action on the protest is dated June 19, 1940, in which the claim was denied. The representatives of the estate were advised of this action and they then requested the case be forwarded to the Technical Staff.

The case was transmitted to the Staff under date of June 19, 1940, where it awaits further action.

(Signed) George D. Martin

SMS:S

Internal Revenue Agent in Charge.

(Defendant's Exhibit D)

* * * * *

C-TS:PD

LA:HLD

TECHNICAL STAFF, PACIFIC DIVISION
ACTION MEMORANDUM

In re Report of Hearing 6/19/40, MT:ET: California.
T.S. No. E-65.

Taxpayer: Estate of Peter Ferry, Catherine B. Ferry,
Executrix, c/o Claude I. Parker, 808 Bank of America
Building, Los Angeles, California.

Represented by: J. Everett Blum, 808 Bank of America
Building, Los Angeles, California.

Collection District: 6th California.

<u>Date of Death</u>	<u>Kind of Tax</u>	<u>Overassessment Claimed by Taxpayer</u>	<u>Overassessment Found by I. R. Agt. in Chge.</u>
June 16, 1935.	Estate	\$63,825.77	None

Internal Revenue Agent in Charge,
Los Angeles, California:

I return herewith the file relating to the above-described case, accompanied by a statement of the issues, the relevant facts and law, and the conclusion reached, with the grounds therefor. This statement has my approval and is incorporated as a part of the record of the case. The Staff Division has reached the following

(Defendant's Exhibit D)

DECISION:

The overassessment in this case is as follows:

<u>Date of Death</u>	<u>Kind of Tax</u>	<u>Overassessment</u>	<u>Amount of Claim to be rejected</u>
June 16, 1935	Estate	None	\$63,825.77

The claim filed on behalf of the above estate in the amount of \$63,825.77 should be rejected and official notice of such rejection should be issued by registered mail to the taxpayer in accordance with the provisions of section 3772(a) of the Internal Revenue Code.

The taxpayer does not agree to the foregoing determination.

Appropriate action should be taken in accordance with paragraph 5 of Commissioner's Mimeograph, R. A. 1014, T. S. No. 57.

By direction of the Commissioner:

(Signed) Virgil Bean WST
Head of Division.

Date: Aug 28 1940
HLD/mom

C-TS:PD
LA:HLD

TECHNICAL STAFF, PACIFIC DIVISION
SUPPORTING STATEMENT

In re Report of Hearing 6/19/40, MT:ET:California.
T.S. No. E-65.

Taxpayer: Estate of Peter Ferry, Catherine B. Ferry,
Executrix, c/o Claude I. Parker, 808 Bank of America
Building, Los Angeles, California.

(Defendant's Exhibit D)

Represented by: J. Everett Blum, 808 Bank of America Building, Los Angeles, California.

Collection District: 6th California.

<u>Date of Death</u>	<u>Kind of Tax</u>	<u>Overassessment Claimed by Taxpayer</u>	<u>Overassessment Found by I. R. Agt. in Chge.</u>
June 16, 1935.	Estate	\$63,825.77	None

Head of Division:

The above-entitled case, referred to the Pacific Division of the Technical Staff, at the request of the taxpayer, has been considered.

In response to a request a conference was granted at Los Angeles, California, on July 8, 1940.

The issues, relevant facts, law and argument and conclusion of the undersigned follow:

I. Issues:

1. Whether an amount of \$32,561.48 representing proceeds of insurance payable to beneficiaries other than the estate in excess of the \$40,000.00 exemption should be included in the gross estate of the decedent.

2. Whether an amount of \$610,837.45 representing property transferred prior to the enactment of section 161(a) of the California Code is includable in the gross estate to the extent of the entire corpus thereof, on the basis of the terms of the respective trust instruments.

II. Findings of Fact:

1. Peter Ferry died June 16, 1935, a resident of Glendale, California. Form 706 was filed on behalf of the estate which

(Defendant's Exhibit D)

Estate of Peter Ferry

Supporting Statement.

reflected a gross estate of \$276,664.17 and disclosed a tax liability amounting to \$16,905.17. As the result of a field investigation a deficiency in estate tax in the amount of \$61,183.19 was determined pursuant to thirty-day letter issued on August 4, 1937.

A substantial portion of the deficiency was caused by adding to gross estate insurance payable to beneficiaries other than the estate, in excess of the \$40,000.00 exemption as follows:

Returned	\$260,071.24
Tentatively determined	292,632.72
	<hr/>
Increase	\$ 32,561.48

The decedent had taken out various life insurance policies during his lifetime. The policies were the ordinary type of printed forms wherein he retained all of the incidents of ownership, such as the right to change the beneficiary, to the date of his death. The statement was made that the premiums on these various contracts were paid after July 29, 1927 with community funds. No evidence was presented in support of this statement. The examining agent states, report dated February 5, 1940, that he endeavored repeatedly between October 23, 1939, and February 5, 1940, to obtain from the representative of the estate proof that the wife of the decedent contributed any community funds in payment of any part of the insurance premiums but that the representative finally advised that he was unable to obtain such proof.

No proof as to such alleged payments was presented during conferences held with the undersigned.

(Defendant's Exhibit D)

2. A substantial portion of the proposed deficiency was due to increasing the gross estate in the amount of \$610,837.45 for the value of property transferred to various trusts by the decedent between the years 1925 and 1935. These were as follows:

	<u>Trust No.</u>	<u>Date Created</u>	<u>Amount</u>
(a)	S-5869	2-10-25	\$108,363.36
(b)	2012	4- 9-25	82,289.16
(c)	1080	7-10-25	2,547.74
(d)	SS-4358	10- 9-25	95,182.02
(e)	1052	11- 2-25	126,604.80
(f)	6204	6- 5-30	195,850.37
<hr/> Total			<hr/> \$610,837.45

Estate of Peter Ferry

Supporting Statement.

Copies of the various trust instruments are contained in the file and attention is invited thereto. With the exception of (c) above, each recites that the trustee has received from Peter L. Ferry and Catherine B. Ferry, husband and wife, trustors, a conveyance and transfer to it of the trust property. The pertinent provisions of the trusts are similar and are substantially as follows:

(a) Peter Ferry reserved the right to revoke or terminate Trust S-5869 in whole or in part during his lifetime with the consent of a majority of the living beneficiaries. The income was payable equally to the trustors and their six children, subject to a payment of \$300.00 per month to Catherine Ferry's mother during her lifetime. Upon the death of the survivor of the trustors the principal was to be distributed as prescribed to the remaining beneficiaries.

(Defendant's Exhibit D)

(b) Trust 2012 provides for the distribution of the income share and share alike, among the trustors and their children, revocation and modification to be effected by the trustors and any three of the remaining beneficiaries. Upon the death of both trustors, the corpus is to be distributed among the children as prescribed thereby.

(c) Trust 1080 was created by Harry G. MacBain, July 10, 1925, to sell certain real estate. On July 10, 1925, decedent purchased a one-tenth interest in the trust and took title thereto as joint tenant with his wife. The record indicates that decedent transferred his interest to three of his children on May 28, 1935, eighteen days prior to his death while in an advanced stage of cancer.

(d) Trust SS-4358 was absolute and irrevocable except that Peter L. Ferry could, during his lifetime, make modifications with the consent of the majority of the other beneficiaries who were his wife and six children. The provision for the disposition of the principal was substantially the same as in the above-described trusts.

(e) In this trust the income was to be paid to the trustors and to the survivor of them during their lives. The trust was to be absolute and irrevocable "except that the Trustors have reserved unto themselves and a majority of the Beneficiaries the right at any time upon written notice delivered to said Trustee, to change the time of payment and/or the proportion of income, and/or the Beneficiaries mentioned in Article Four of this Trust
* * *."

The provision for the distribution of the principal upon the death of the trustors is substantially the same as in the other trusts.

(Defendant's Exhibit D)

Estate of Peter Ferry

Supporting Statement.

(f) In this trust the income is payable to trustors jointly during their lifetime and upon the death of either the entire income is payable to the survivor during his or her lifetime. Upon the death of the survivor the corpus is to be distributed equally to the then living children, except that the share of any child under 30 years of age is to be held in trust until such child reaches the age of 30. Trustors reserved the right during their lifetime, acting jointly, to revoke, change, amend or substitute.

After protest the case was considered by the Conference Section of the Bureau and the proposed deficiency was sustained. At the request of the estate's representative the case was reviewed by the Committee on Appeal and Review which sustained the Conference Section. A proposal made by the representative of the estate that it concede the insurance issue and the inclusion of three-fourths of the total trusts in gross estate was rejected by the foregoing action.

Bureau letter MT-ET-7738-6th California, dated February 5, 1938, allowed a credit of \$27,980.46 for State estate, inheritance, legacy and succession taxes. Collector's Form 899 indicates that the full deficiency was paid. Subsequently the estate, on February 20, 1939, filed a claim in the amount of \$63,825.77 and requested reconsideration of both issues. After reconsideration in the field conference office the claim was denied. The recomputation as the result of such conference determined a deficiency of \$848.93. The computation failed to allow a deduction of \$5,950.00, representing a transfer of bank stock and additional expenses of decedent amounting to

(Defendant's Exhibit D)

\$3,310.17 paid by the estate, which were recommended for allowance in Bureau letter MT:ET:Cl. 7738—6th California, dated January 22, 1938. These appear to be proper adjustments and should be allowed, eliminating the proposed additional deficiency, which is barred by statute.

III. Law and Argument:

1. This issue presents the question as to whether gross estate should be increased by the proceeds of insurance payable to beneficiaries other than the estate, in excess of the \$40,000.00 exemption.

The estate's representative relies on the cases of *Lang v. Commissioner*, 304 U.S. 264 (20 A.F.T.R. 1251) and *Elizabeth C. McCoy, Adm'x.*, 37 B. T. A. 114. The *Lang* case involved the Revenue Act of 1926. Section 302(g) of that Act, as amended, provides for the

Estate of Peter Ferry

Supporting Statement.

inclusion in the gross estate at the time of decedent's death of the amount receivable, in excess of \$40,000.00, by all other beneficiaries as insurance under policies taken out by the decedent. Article 25, Regulations 70, states that insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application.

Article 25, Regulations 80 (1934 Edition) (as amended by T.D. 4729), provides that insurance is considered to have been taken out by the decedent, whether or not he made the application, if he acquired the ownership of, or any legal incident thereof, in the policy. Legal incidents of ownership in the policy, the article continues, include the right of the insured or his estate to its eco-

(Defendant's Exhibit D)

conomic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, and the like.

All of the policies in this case were taken out by the decedent upon his own life. They were the usual standard form of policy giving him legal incidents of ownership such as changing the beneficiary, assignment and the like. They thus come within the express wording of Article 25. The estate's representative failed to show that any portion of the premiums was paid by community funds. But even if this were shown it appears immaterial in view of the provisions of Article 25, Regulations 80. Due to the difference in the express wording of Article 25, Regulations 80, as compared with the same article in Regulations 70, the Lang decision is not applicable in this case. The Court, itself, recognized this fact when it stated:

"Treasury Regulations 70 were in force when Lang died and are applicable to his estate. It is unnecessary for us to consider the meaning, validity or effect of the changes introduced by Regulations 80."

In the McCoy case, *supra*, the question was whether the laws of California were the same as those of the State of Washington with respect to life insurance where the premiums had been paid out of community funds. The question of the difference in the regulations was not discussed, as herein presented. The decedent in the McCoy case died in 1932. Hence Regulations 70 would be applicable as in the Lang case. It is apparent that the McCoy case is not controlling herein.

It was held in *Newman v. Commissioner*, 76 F(2d) 449, where decedent had taken out policies of insurance wherein he reserved the right to change the beneficiaries, and where the premiums were paid out of community property, and the proceeds were to go

(Defendant's Exhibit D)

Estate of Peter Ferry

Supporting Statement.

to his wife, that the transaction is regarded as a gift by the husband to the wife, and the estate of neither is regarded as having paid the premiums so as to be entitled to reimbursement on account of the payment.

In the Estate of Cyprian A. Spork, Sr., 40 B.T.A. 924 (acq.) decedent died in 1936 in Louisiana leaving a large amount of life insurance. He had had the right up to the date of his death to change the beneficiary. All of the premiums on the policies were paid out of community property. It was held that the total value of the insurance policies at date of death in excess of \$40,000.00 was includable in the gross estate.

While both the Spork and the Newman cases, *supra*, involved community property laws of Louisiana, no material or essential difference between such laws of that State and those of California as to nullify the controlling effect of those decisions in the instant case was asserted or established by the estate's representative. From a study thereof and consideration of cases involving the laws of these states, it does not appear that any material difference therein exists.

2. This issue involves the question as to whether the establishment of certain trusts by the decedent and his wife amounted to a property settlement between the spouses, giving the wife a vested interest therein, which one-half interest should be excluded from the gross estate of the decedent.

The corpus of all five of the trusts was acquired by the decedent during coverture prior to the enactment of section 161(a) of the California Civil Code giving the

(Defendant's Exhibit D)

wife a vested interest in the community. Prior to the enactment of this section of the Code, the wife had a mere expectancy in the community. The rights of the husband were so complete that the husband was the owner of the community. *U. S. v. Robbins*, 269 U.S. 315. The fact that the wife became a co-trustor is therefore without significance or effect. She contributed nothing of her own and her participation was a mere formality.

It is contended that the legal effect of these trusts was to constitute the wife a tenant in common with her husband in the corpus thereof. There is nothing to indicate that the wife acquired any additional property or property rights by becoming a signatory to the trust instruments. Had any of the trusts been revoked, by the terms of the instruments the corpus would have become the property of the trustors, in which event an estate of tenancy in common might have been created. However, none of the trusts was revoked during the decedent's lifetime.

Estate of Peter Ferry

Supporting Statement.

The decedent had also reserved the power, to alter, revoke, or amend the trusts, with the concurrence of certain of the beneficiaries.

Article 20(a), Regulations 80 (1937 Edition) provides that all trusts are subject to tax when the transfer was made after the enactment of the Revenue Act of 1924 and before the amendment of the subdivisions by the Revenue Act of 1934 became effective, and the decedent's death occurred at any time subsequent to the transfer, with power of revocation reserved to the decedent, alone or with others, having or not having a substantial adverse interest in such property.

(Defendant's Exhibit D)

The wife contributed nothing to the trusts. She had no interest in the trust property other than the life estate given her in certain of the trusts. The decedent reserved the power to alter, amend and revoke the trusts with the consent of others having substantial adverse interests in the property. Accordingly the property, or corpus, of all five trusts are includable in the gross estate of the decedent.

The representative of the estate submitted a proposal for settlement as follows:

(a) That the estate concede issue 1 in full.

(b) That there be included in the gross estate \$503,-940.90 of the transfers in trust and that the remainder thereof, or \$106,896.55 be excluded. Acceptance of this proposal would result in an overassessment and refund of \$7,199.84 plus interest. Careful consideration of this offer in the light of the applicable law leads to the conclusion that the proposed offer is unacceptable.

On the basis of the foregoing, the claim for refund of the estate in the amount of \$63,825.77 should be officially rejected in accordance with established procedure.

IV. Conclusion:

Since the taxpayer did not submit an acceptable proposal for settlement the case should be returned to the Revenue Agent in Charge for appropriate action.

(Signed) H. L. Ducker

Assistant Technical Advisor.

HLD/mom

Aug 26 1940

* * * * *

(Defendant's Exhibit D)

Oct 18 1940

MT-ET-7738-6th California

Estate of Peter Ferry

Date of death—June 16, 1935

Catherine B. Ferry, Executrix,

3030 N. Chevy Chase,

Glendale, California.

Madam:

Reference is made to the claim on Form 843 filed on February 9, 1939, on behalf of the above-named estate for the refund of \$63,825.77, Federal estate tax paid, "or such greater amount as is legally refundable with interest." The claim involves two issues, first, as to whether the amount of \$32,561.48, representing proceeds of insurance payable to beneficiaries other than the estate in excess of the \$40,000.00 exemption, should be included in the gross estate of the decedent; and the other as to whether the amount of \$610,837.45, representing property transferred prior to the enactment of section 161(a) of the California Code, is includible in the gross estate to the extent of the entire corpus thereof on the basis of the terms of certain trust instruments.

With respect to the first issue you contend that the life insurance policies should not be taxed in full, but an allowance should be made of the claimed community interest stated to be vested in you. You rely on the case of *Lang v. Commissioner*, 304 U.S. 264 (20 A.F.T.R. 1251) and the case of *Elizabeth C. McCoy, Administratrix*, 37 B.T.A. 114.

The Bureau has considered the cases cited and is of the opinion that they are not controlling in this case.

(Defendant's Exhibit D)

It appears that all of the policies in this case were taken out by the decedent upon his own life. They were the usual standard form of policy, giving him legal incidents of ownership such as changing the beneficiary, assignment and the like. They thus come within the express wording of Article 25 of Estate Tax Regulations 80. No evidence has been submitted showing that any part of the premiums was paid out of community funds.

2—Estate of Peter Ferry

With respect to the second issue you contend that the six trusts are taxable only to the extent of one-half because the establishment of the trusts amounted to a property settlement between the decedent and yourself, giving you a vested interest therein.

It appears that the corpus of all six of the trusts was acquired by the decedent during coverture prior to the enactment of section 161(a) of the California Civil Code giving the wife a vested interest in the community. Prior to the enactment of this section of the Code, the wife had a mere expectancy in the community. The rights of the husband were so complete that the husband was the owner of the community. *U. S. v. Robbins*, 269 U.S. 315. The fact that the wife became a cotrustor is therefore without significance or effect. She contributed nothing of her own and her participation was a mere formality.

It is contended that the legal effect of these trusts was to constitute the wife a tenant in common with her husband in the corpus thereof. There is nothing to indicate that the wife acquired any additional property or property rights by becoming a signatory to the trust instruments. It may be assumed, without conceding that

(Defendant's Exhibit D)

upon revocation of any of the trusts the corpus by the terms of the instruments would have become the property of the trustors, in which event a tenancy in common might have been created. However, none of the trusts was revoked during the decedent's lifetime. The fact remains that the transfers were made by decedent after the enactment of the Revenue Act of 1924, and the decedent reserved the power, to alter, revoke or amend the trusts, with the concurrence of certain (but less than all) of the beneficiaries, and such power was in existence at the date of decedent's death. The transfer, therefore, comes within section 302(d) of the Revenue Act of 1926.

On the basis of the foregoing, and since there does not appear to be an overpayment of Federal estate tax in this case, the claim filed on February 9, 1939, for the refund of \$63,825.77 is rejected in its entirety.

Respectfully,

Guy T. Helvering,
Commissioner.

By (Signed) D. S. Bliss
D. S. Bliss,

Deputy Commissioner.

JFH zm

[Endorsed]: No. 2106 OC. Ferry vs. Rogan. Deft. Exhibit No. D in evid. Filed 6/7, 1943. By Cross, Deputy Clerk.

[DEFENDANT'S EXHIBIT F]

MT-ET-7738-6th California

Estate of Peter Ferry

Date of death—June 16, 1935

Jun 22 1937

Mr. George D. Martin,
Internal Revenue Agent in Charge,
939 South Broadway,
Los Angeles, California.

My dear Mr. Martin:

Reference is made to your report dated January 30, 1937, of an investigation of the above-named estate by Internal Revenue Agent Nat N. Eddy.

The report of Internal Revenue Agent Eddy makes mention of an appraisal of Preston H. Leslie relative to the valuation of property contained in certain trusts disclosed under Schedule E in the estate tax return, Form 706. However, examination of the file fails to disclose such an appraisal.

In this connection, it is requested that you submit to this office at your earliest convenience inventories showing the value of the property contained in each of the above-mentioned trusts as of the date of the decedent's death.

Very truly yours,

(Signed) D. S. Bliss,
D. S. Bliss,
Deputy Commissioner.

GCW:DH

(Defendant's Exhibit F)

[Crest]

Office of
Internal Revenue Agent in Charge
Los Angeles Division
Los Angeles Division

TREASURY DEPARTMENT

Internal Revenue Service
939 South Broadway
Los Angeles, Calif.
June 26, 1937.

MT:ET:7738

District of 6th California

Estate of Peter Ferry

Date of death: June 16, 1935

[Stamped]: Bureau Record

[Stamped]: Dispatched from Files E. T. Div. Without Case Jul 1 1937

[Stamped]: Received—Files Jun 30 1937 Estate Tax
Commissioner of Internal Revenue,
Washington, D. C.

Receipt is acknowledged of Bureau letter dated June 22, 1937, in the above named estate.

In this connection, there is transmitted herewith an appraisal by Preston H. Leslie relative to the valuation of property contained in certain trusts disclosed under Schedule E in the estate tax return, Form 706, and which

(Defendant's Exhibit F)

was referred to in Internal Revenue Agent Eddy's report of January 30, 1937.

George D. Martin

GEORGE D. MARTIN,

Internal Revenue Agent in Charge.

SMS:S

Enclosure

[Stamped]: Received From Files Jul 2 1937 Field
Review

Los Angeles, Calif.

San Francisco, Calif.

Washington, D. C.

CLAUDE I. PARKER

Attorney at Law

937 Munsey Building

Washington, D. C.

National 5623

[Stamped]: Internal Revenue Aug 31 1937 Miscel-
laneous Tax Unit

August 30, 1937.

Hon. Guy T. Helvering,

Commissioner of Internal Revenue,

Washington, D. C.

In re: Estate of Peter Ferry,
Los Angeles, California.

(Defendant's Exhibit F)

Sir:

Reference is made to your letter of August 4, 1937, granting thirty days in which to file a protest against the findings of the Commissioner in the above noted case.

The attorney who is handling the case in our Los Angeles office is absent from this country and is not expected to return until about October 1st.

It will be greatly appreciated if an extension of time until November 4, 1937 is granted the Estate of Peter Ferry in which to file a protest.

Respectfully,

L. A. Luce

N.J.P.

MT-ET-7738-6th California

Estate of Peter Ferry

Date of death—June 16, 1935

Sep 7-1937

Catherine B. Ferry, Executrix,
3030 North Chevy Chase,
Glendale, California.

Madam:

Reference is made to the request of Mr. L. A. Luce for an extension of time for the filing of certain evidence in connection with the above-named estate.

The extension granted to November 4, 1937, is hereby confirmed.

Respectfully,

(Signed)

(Signed) ADELBERT CHRISTY

Adelbert Christy,

Acting Deputy Commissioner.

NJP/R

(Defendant's Exhibit F)

November 10, 1937.

MT-ET-7738-6th California
Estate of Peter Ferry

L. A. Luce, Attorney,
937 Munsey Building,
Washington, D. C.

Sir:

In compliance with your request, a hearing with respect to the Federal estate tax liability of the above-named estate has been scheduled for 9:30 a. m., December 16, 1937, Room 6237, Internal Revenue Building, Twelfth Street and Constitution Avenue, Northwest, Washington, D. C.

Any additional documentary evidence which the estate desires to submit in support of its contentions should be on file in this office five days prior to the date of the hearing.

Respectfully,

(Signed) D. S. Bliss,
D. S. Bliss,
Deputy Commissioner.

ms

ROUTING TAG

To: Storz
From: LAC

Return to sender
(if checked).....

should further cont be granted?

Yes, in accordance with understanding at 1st comp.

G. S.

(Defendant's Exhibit F)

[Stamped]: Internal Revenue Nov. 4 1937 Miscel-
laneous Tax Unit

[Stamped]: Received—Files Nov 5 1937 Estate Tax

[Stamped]: Protest M.H.H./AMB

STATEMENT OF PROTEST

With Respect To

DEFICIENCY CLAIMED IN FEDERAL ESTATE
TAX PROPOSED TO BE ASSESSED AGAINST
CATHERINE B. FERRY, EXECUTRIX OF THE
ESTATE OF PETER FERRY, WHO DECEASED
JUNE 16, 1935.

PROTESTANT'S ADDRESS IS:

Care of Claude I. Parker,
808 Bank of America Building,
650 South Spring Street,
Los Angeles, California.

Los Angeles, California,
October 29, 1937.

[Stamped]: Dispatched from Files E. T. Div. With
Case Nov 6 1937

Honorable Guy T. Helvering,
Commissioner of Internal Revenue,
Washington, D. C.

Sir:

Receipt is acknowledged of your letter bearing date of
August 4, 1937, carrying symbols MT-ET-7738-6th Cali-
fornia, and bearing signature of D. S. Bliss, Deputy Com-
missioner, which letter authorizes taxpayer, if dissatisfied
with the tentative decision of the Commissioner of In-

(Defendant's Exhibit F)

ternal Revenue therein made, to file, within a period of thirty days, her protest.

Receipt is also acknowledged of your letter bearing symbols above given, in which the time for filing protest against the proposed deficiency set forth in your letter of August 4, 1937 is extended to November 4, 1937.

Protestant expresses her appreciation for the privilege of being permitted to register her dissatisfaction with the proposed determination of the Commissioner and expresses her appreciation of the extension granted within which to file this protest.

Protestant is dissatisfied with the proposed determination and assigns errors specifically as follows:

First: That the Commissioner has erred in increasing the gross estate by including therein certain trusts specifically set out in said letter of August 4, 1937.

Second: That the Commissioner erred in increasing valuations of items of insurance as set out in said letter of August 4, 1937.

Third: That the Commissioner erred in refusing to allow the full amount of deductions shown in the Federal estate tax return filed, and in allowing only the amount of deductions to the extent of the value of the probate estate.

The facts upon which the protestant relies are briefly as follows:

Respecting the inclusion in the gross estate of certain trusts as transfers, protestant states that prior to the death of the decedent, the decedent and your protestant

(Defendant's Exhibit F)

made certain transfers of their property in trust; that said trusts are as follows:

Trust No. 5869, created February 10, 1925, in which the Security Trust and Savings Bank, a corporation, was named as Trustee, and in which the decedent and your protestant were named as Trustors;

Trust No. 2012, created April 9, 1925, in which the Citizens National Trust and Savings Bank was the Trustee, and the decedent and your protestant were the Trustors;

Trust created October 9, 1925, in which the Pacific Southwest Trust and Savings Bank was the Trustee, and in which the decedent and your protestant were the trustors.

Trust No. 1052, created Nvember 2, 1925, in which the Title Guarantee and Trust Company was named Trustee, and in which the decedent and your protestant were named the Trustors;

Trust No. 6204, created June 5, 1930, in which the Citizens National Trust and Savings Bank of Los Angeles was named the Trustee, and in which the decedent and your protestant were named the Trustors.

In each and every of said trusts it will be noted that both the decedent and your protestant are the trustors. The creation of such trusts effected between the decedent and your protestant a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided One-Half ($\frac{1}{2}$) interest in the property which comprised the corpus of the trust.

(Defendant's Exhibit F)

In California a husband and wife may make a property settlement agreement. (See Section 158, Civil Code of the State of California).

In California contracts may be either express or implied. (See Section 1619, Civil Code of the State of California).

An implied contract is one the existence of terms of which is manifested by conduct. (See Section 1621, Civil Code of the State of California).

It cannot be doubted that in the instant matter the decedent and protestant by their conduct in placing their property in trust effected a property settlement agreement and that, therefore, each would be the owner at the time of the creation of such trust of an undivided One-Half ($\frac{1}{2}$) interest in the property comprising the corpus of said trust, as hereinbefore stated; that, therefore, no more than One-Half ($\frac{1}{2}$) of the value of the corpus of such trusts would be included in the gross estate of the decedent for Federal estate tax purposes. Further, if the trusts had been revoked, or could have been revoked, the property would have vested in the decedent and your protestant as tenants in common since, upon the revocation of a trust, the corpus of such trust re-vests in the trustors thereof. (See Section 2280 of the Civil Code of the State of California). Such transfers, therefore, should not be included in the gross estate of the decedent to the full extent of their value but, at most, should be included only as to One-Half ($\frac{1}{2}$) of the value of the corpus of said trusts.

Bank of America Trust Co. v. Com. (Merton J. Price Est) 34 BTA 684 aff'd 9th CCA 6-21-37

(Defendant's Exhibit F)

As to the increase in valuation of insurance policies, your protestant is informed and believes and, therefore, states it to be a fact that the values returned in the Federal estate tax return filed herein are the true values of such insurance policies.

As to the deductions taken by the estate of decedent, there is apparently no dispute as to the correctness thereof. The Commissioner has merely limited the deductions to the total appraised value of the probate estate, apparently upon the theory that that amount represents the total amount of the debts and deductions which will be payable out of said probate estate. This question has been ruled upon by the Board of Tax Appeals and the Federal Courts adversely to the position taken by the Commissioner.

See Union Guardian Trust Co. 32 B.T.A. 996;

Mary Q. Hallock, 34 B.T.A. 575;

Edna F. Hays, 34 B.T.A. 808;

Edith M. O'Donnell, 35 B.T.A. 37, decided January 12, 1937;

Commissioner of Internal Revenue v. Strauss, 77 Fed. (2nd) 401;

Baer v. Milbourne, 13 Fed. Supp., 998;

Thomas De C. Ruth, et al., v. Commissioner, Docket No. 80840, promulgated June 22, 1937, 36 B.T.A.;

Commissioner v. Ames, 88 Fed. (2nd) 388;

Commissioner v. Windrow, Fed. (2nd)
(C.C.A. 5th Circuit, March 6, 1937);

(Defendant's Exhibit F)

Helvering v. Northwestern National Bank,
Fed. (2nd) (C.C.A. 8th Circuit, April 14,
1937).

It is respectfully submitted that this question is no longer an open question but has been definitely decided that the full amount of deductions, irrespective of the value of the probate estate, should be allowed.

In conclusion, your protestant submits that a reconsideration should be given by the Commissioner to the points here involved, and, upon such reconsideration, adjustments made in accordance with the facts and arguments set forth herein, and that no more than One-Half ($\frac{1}{2}$) of the value of the corpus of the trusts should be included in decedent's gross estate; that the insurance policies should be valued as per the Federal estate tax return; and that the full amount of the deductions as claimed in the Federal estate tax return should be allowed.

Respectfully submitted,

CATHERINE B. FERRY

Catherine B. Ferry

Executrix of the Estate of Peter Ferry

Claude I. Parker

CLAUDE I. PARKER

Ralph W. Smith

RALPH W. SMITH

808 Bank of America Building,

Los Angeles, California,

Attorneys for the Administratrix

Of Counsel:

L. A. Luce,

L. A. LUCE,

937 Munsey Building,

Washington, D. C.

(Defendant's Exhibit F)

State of California

County of Los Angeles—ss:

Catherine B. Ferry, being first duly sworn, deposes and says: that she is the duly appointed, qualified and acting Administratrix of the Estate of Peter Ferry, deceased and is the taxpayer named in the foregoing Statement of Protest and that she has read the said protest and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information and/or belief, and as to those matters that she believes it to be true.

Catherine B. Ferry

Subscribed and sworn to before me this 30 day of Oct,
1937

Verna Frantz

Notary Public in and for the County of
Los Angeles, State of California

My Commission Expires May 14, 1941.

CERTIFICATE

I hereby certify that the foregoing protest was prepared by me for and on behalf of taxpayer; that the facts recited in said protest are the exact facts as given to me by the taxpayer and to the best of my knowledge and belief are true and correct.

Dated at Los Angeles, California, this 30 day of October, 1937.

J. EVERETT BLUM

With CLAUDE I. PARKER &

RALPH W. SMITH

808 Bank of America Building
Los Angeles, California.

(Defendant's Exhibit F)

Los Angeles, Calif.
San Francisco, Calif.
Washington, D. C.

CLAUDE I. PARKER
Attorney at Law
937 Munsey Building
Washington, D. C.
National 5623

November 5, 1937.

[Stamped]: Internal Revenue Miscellaneous Tax
Unit Nov 6 1937. Received Nov 19 1937 Estate Tax
Division

Honorable Guy T. Helvering,
Commissioner of Internal Revenue,
Washington, D. C.

Attention—Estate Tax Division.
MT-ET-7738-6th California.

In re: Estate of Peter Ferry.

Sir:

A protest was filed in the above case on November 4, 1937. After your office has had an opportunity to consider the protest it is respectfully requested that the undersigned be granted a conference as duly authorized representative of the Estate of Peter Ferry.

Respectfully,

L. A. Luce

(Defendant's Exhibit F)

[Written]: Grant Conf — No valuation question C P
MT-ET-C1-7738-6th California

Estate of Peter Ferry

Date of death—June 16, 1935

December 23, 1937.

Mr. H. K. Melcher,

Head, Estate Tax Division.

CONFERENCE MEMORANDUM—ESTATE TAX DIVISION

Date of hearing: December 16, 1937.

Estate represented by: L. A. Luce, attorney holding
power of attorney and practice card.

Bureau represented by: C. Palmer, Adjustment Section.

Subject: Insurance, transfers, and limitation of deductions.

Gross Estate

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Insurance:			
Insurance payable to beneficiaries other than the estate in excess of the \$40,000.00 exemption	\$260,071.24	\$292,632.72	\$292,632.72

The decedent retained all incidents of ownership in the policies to the date of his death. However, the estate contends that the wife acquired a vested community in-

(Defendant's Exhibit F)

terest in one-half of the insurance that was purchased by premiums paid with community funds subsequent to July 29, 1927, the effective date of section 161(a) of the Civil Code of California.

2—Estate of Peter Ferry

This question was settled by the decision of Newman v. Commissioner, 76 Fed. (2d) 449, certiorari denied 56 S. Ct. 116. The principle announced in the Newman case was adopted and applied in the Merton J. Price estate (a California case) in Bank of America Trust Company v. Commissioner, 34 B. T. A. 684, which was affirmed by the Ninth Circuit Court of Appeals on June 21, 1937. Accordingly, the entire amount of the proceeds of the policies in excess of \$40,000.00 was properly included in the gross estate in the 30-day letter and no adjustment is in order.

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Transfers:			
Trust No. 6204			
created June 5,			
1930	0.00	\$195,850.37	\$195,850.37

The first paragraph of the trust instrument recites that the trustee has received from Peter L. Ferry and Catherine B. Ferry, husband and wife, of Glendale, California, hereinafter called "trustors", a conveyance and transfer to it of the trust property.

The important provisions of the trust are as follows:

"Article VI

"During the term of this trust said Trustors have reserved and it is an express term and provision of

(Defendant's Exhibit F)

this trust, that they shall be allowed to continue in full, free and undisturbed possession of the whole of the trust estate, without any rental or accounting therefor to said Trustee or any of the other beneficiaries under this trust; but they shall not incur any liabilities in connection therewith for which the Trustee may in any event become legally chargeable. Provided, however, that at any time upon the written request of Trustors, or the survivor and two beneficiaries herein, Children of Trustors, and after the death of both of Trustors, then upon the request of the majority of beneficiaries herein, Children of Trustors, said Trustee shall take over the actual and active management of the trust estate.

3—Estate of Peter Ferry

“Article VII

“The entire net income derived from the trust estate and available for distribution hereunder shall be paid monthly to the Trustors jointly during their lifetime, and, upon the death of either, then to the survivor during his or her lifetime, or until the revocation or modification of this trust as hereinafter provided. Trustee to make quarterly statements.

“Article VIII

“Upon the demise of the surviving Trustor, the Trustee shall apportion the trust estate remaining (but without making any physical segregation or division thereof except if and when and to the extent required to make distribution therefrom as herein-

(Defendant's Exhibit F)

after provided) into undivided shares or portions as follows:

"One share shall be apportioned upon the principle of representation to each of the then living children of the Trustors and then living lawful issue of each deceased child.

* * *

"Article XI

"It is a further provision of this trust, that said Trustors have reserved, and said Trustee does hereby assent to, the express right and power reserved unto said Trustors during their joint lives and acting jointly, and upon the death of either of them then to the survivor acting jointly with two of the Children of Trustors, herein named beneficiaries, to revoke in whole or in part this trust at any time by notice of revocation in writing, addressed and delivered to said Trustee and executed by the required parties above stated; said notice to be given at least thirty (30) days prior to the taking effect of such revocation.

* * *

"It is an express term and condition of this trust that the Trustors have reserved and vested in

4—Estate of Peter Ferry

themselves jointly during their joint lives, and after the death of either of them then unto the surviving Trustor and two of the Children of Trustors, herein named beneficiaries, the general and specific right, power and option at any time or from time to time

(Defendant's Exhibit F)

during their lives and while this trust is in effect, by written instrument executed jointly with said Trustee, to change or amend, substitute or add other or new provisions to this trust in whole or in part in any respects without limitation."

The entire income was payable to the trustors jointly during their lifetime and upon the death of either the entire income is payable to the survivor of the trustors during his or her lifetime. Upon the death of the surviving trustor, the property is to be distributed in equal shares among the then living children of the trustors and the issue of any deceased child, except that the share of any children under the age of 30 years is to be held in trust until such child reaches the age of 30 years. The trustors reserved the power during their joint lives to revoke the trust in whole or in part and after the death of one of the trustors, the surviving trustor, acting jointly with two of the children, had the power to revoke the trust in whole or in part.

The trustors also reserved the right, acting jointly during their joint lives, to change or amend, substitute or add other or any provisions to the trust without limitation, and after the death of one of the trustors such right was reserved to the surviving trustor acting jointly with two of the children.

As this trust was created after the effective date of the Revenue Act of 1924 and could have been altered, amended, or revoked with the consent of the wife, who was only one of seven named beneficiaries, the transfer comes squarely within the provisions of section 302(d) of the Revenue Act of 1926, and the decision of the

(Defendant's Exhibit F)

Supreme Court of the United States in the case of City Bank Farmers Trust Company v. Commissioner in the Gertrude Feldman James estate. Also, the entire value of the trust is includible in the gross estate under the provisions of section 803 of the Revenue Act of 1932 as the decedent retained the right to receive the income therefrom for a period not ascertainable without reference to his death.

5—Estate of Peter Ferry

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Transfers (cont'd):			
Trust No. 2012			
created April 9,			
1925	0.00	\$82,289.16	\$82,289.16

The first paragraph of the trust agreement recites that Peter L. Ferry and Catherine B. Ferry, his wife, hereinafter called the "trustors", have deposited with the trustee certain described property.

The important provisions of the trust are as follows:

"2. To receive and receipt for all of the income which may be derived from the corpus of this Trust and to pay over monthly to Peter L. Ferry and Catherine B. Ferry, his wife, Mary Alice Ferry, James L. Ferry, Peter L. Ferry, Jr., Catherine Helen Ferry, John M. Ferry and William F. Ferry, children of Peter L. Ferry and Catherine B. Ferry upon their sole and separate receipt, all the income de-

(Defendant's Exhibit F)

rived therefrom, share and share alike, for the remainder of their natural lives unless this Trust be previously terminated as hereinafter provided.

* * *

"This Declaration of Trust may be revoked, modified or amended upon the written order of Peter L. Ferry and Catherine B. Ferry, and any three of the remaining beneficiaries hereunder."

Under date of March 30, 1929, the trust was amended to include as a beneficiary a child born after the date of the creation of the trust.

The trust provides that upon the death of the decedent and his wife the interest of four of the children in the principal is payable to them in installments upon their arriving at certain ages, and the interest of the two remaining children is to be held in trust for them for life with remainder to their issue.

6—Estate of Peter Ferry

This trust was created after the effective date of the Revenue Act of 1924 and could have been revoked by the decedent and his wife with the consent of any three of the six children beneficiaries. Accordingly, the transfer comes within the provisions of section 302(d) of the Revenue Act of 1926.

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Transfers (cont'd):			
Trust No. S-5869			
created February			
10, 1925	0.00	\$108,363.36	\$108,363.36

(Defendant's Exhibit F)

The first paragraph of the trust agreement recites that the trustee has received from Peter L. Ferry and Catherine B. Ferry, his wife, the "trustors", certain property.

The important provisions of the trust are as follows:

"IV.

"It is an express provision of this trust that there has been reserved the right (to which reservation the Trustee hereby assents) in the Trustor, Peter L. Ferry, to revoke and terminate this trust, in whole or in part, at any time during his life, by a notice of revocation in writing, signed by him, and addressed and delivered to the Trustee at its Trust Department at its [its] Head Office, in Los Angeles, California, not less than thirty (30) days prior to the taking effect of such revocation, providing that a majority of the living beneficiaries (including each of the Trustors) who at that time are entitled to receive income from this trust and who are under no disability, shall consent in writing to such revocation. On such revocation becoming effective, the trust as to the portion of the trust estate to which such notice may relate, if it be only in part, or as to the entire trust estate, if it be a total revocation, shall terminate, and such part of the trust estate or all, as the case may be, shall vest in and be conveyed, transferred and delivered, discharged of any trust, to the Trustors, if they both are living, and if Peter L. Ferry alone of the Trustors be living, then to him.

(Defendant's Exhibit F)

7—Estate of Peter Ferry

"VIII.

"The net income derived from the trust estate, to the extent of Three Hundred (\$300.00) Dollars per year only, shall go and be paid in monthly installments to Mrs. Mary B. O'Brien, who is the mother of the Trustor, Catherine B. Ferry, as long as said Mary B. O'Brien shall live. Subject to the payment of this amount to Mrs. Mary B. O'Brien (and the trust unless revoked shall not terminate prior to her death), the net income shall be paid in monthly installments as nearly equal as practicable, as follows:

"In equal shares to each of the Trustors and each of the lawful children of the Trustors, their present children and the dates of their births being as follows: (Names of six children follow.)"

The provision for distribution of the principal upon the death of the survivor of the trustors is substantially the same as provided in the two preceding trusts.

As the trust was created after the effective date of the Revenue Act of 1924 and was subject to revocation by the decedent with the consent of his wife and a majority of the children, the transfer comes within the provisions of section 302(d) of the Revenue Act of 1926.

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Transfers (cont'd):			
Trust No. SS-4358			
created October 9,			
1925	0.00	\$95,182.02	\$95,182.02

(Defendant's Exhibit F)

The trust agreement recites that the property was received by the trustee from Peter L. Ferry and Catherine B. Ferry, his wife, as "trustors".

8—Estate of Peter Ferry

The important provisions of the trust are as follows:

"VII.

"The entire net income derived from said trust estate and available for distribution hereunder shall be paid monthly in equal parts share and share alike to the trustors, Peter L. Ferry, Catherine B. Ferry, and their issue, Mary Alice Ferry, James L. Ferry, Peter L. Ferry, Jr., Catherine H. Ferry, John M. Ferry and William Ferry, for and during the terms of their natural lives or of the happening of the events hereinafter provided for.

* * *

"IX.

"It is an express condition of this trust that the same is hereby made absolute and irrevocable except as to the power reserved in the trustor to make modifications therein during the lifetime of the trustor, Peter L. Ferry, such modification or modifications to be effective only with the consent of the majority of the beneficiaries under this trust.

"After the death of the trustor, Peter L. Ferry, the above power to modify this trust shall cease and terminate.

"X.

"It is a further provision of this trust that the said trustors have reserved unto themselves and a

(Defendant's Exhibit F)

majority of the beneficiaries, the right, at any time upon written notice delivered to the said Trustee, to alter and change the terms and conditions of this trust as well as the beneficiaries therein named and such right shall be effective immediately upon the receipt of said Notice by said Trustee except in so far as such alteration or changes would affect the term of the preceding paragraph hereof making the said trust absolute and irrevocable."

9—Estate of Peter Ferry

The provision for disposition of the principal is substantially the same as contained in the other trusts.

This trust was created after the effective date of the Revenue Act of 1924. The decedent reserved the right to make modifications during his life with the consent of a majority of the beneficiaries and the decedent reserved the right, with the consent of his wife and a majority of the beneficiaries, to alter and change the terms and conditions of the trust as well as the beneficiaries. This transfer comes within the provisions of section 302(d) of the Revenue Act of 1926.

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Transfers (cont'd):			
Trust No. 1052			
created November 2,			
1925	0.00	\$126,604.80	\$126,604.80

The first paragraph of the trust agreement recites that the trustee has received the trust property from Peter L. Ferry and Catherine B. Ferry, the trustors.

(Defendant's Exhibit F)

The important provisions of the trust are as follows:

"Fourth: The entire net income derived from the Trust Estate and available for distribution hereunder shall be paid monthly to the Trustors and to the survivor of them, during their lives. * * *

* * *

"Fifth: It is an express provision of this Trust that the same is and shall be absolute and irrevocable except that said Trustors have reserved unto themselves and a majority of the Beneficiaries the right at any time upon written notice delivered to said Trustee, to change the time of payment and/or the proportion of income, and/or the Beneficiaries mentioned in Article Four of this Trust, and such change shall be effective immediately upon receipt of said written notice by said Trustee."

10—Estate of Peter Ferry

The provision for distribution of the principal upon the death of the trustors is substantially the same as contained in the other trusts.

As the trust was created after the effective date of the 1924 Act and as the trustors reserved the right with the consent of a majority of the beneficiaries, to change the beneficiaries and change the proportion of the income payable to the beneficiaries, the transfer comes within the provisions of section 302(d) of the Act.

This trust was amended on March 3, 1930, to include as a beneficiary the child born on March 17, 1929.

(Defendant's Exhibit F)

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Transfers (cont'd):			
Trust No. 1080			
created July 10,			
1925	0.00	\$2,547.74	\$2,547.74

The above item represents a declaration of trust created by Harry G. MacBain to sell certain real estate. On July 11, 1925, the decedent purchased a 1/10 interest in the trust and took title thereto as joint tenant with his wife. The internal revenue agent states on page 13 of his report that the decedent transferred his interest in the joint tenancy to three of his children as a gift on May 28, 1935. The transfer was made 18 days prior to decedent's death when decedent was in the last stages of cancer. This transfer may be included only as a transfer made in contemplation of death.

	<u>Returned</u>	<u>Tentatively Determined</u>	<u>Proposed Determination</u>
Transfers (cont'd):			
476 shares First			
National Bank of			
			0.00
Glendale	0.00	\$5,950.00	\$5,950.00

11—Estate of Peter Ferry

On December 8, 1934, the decedent transferred 476 shares of First National Bank stock to his son Peter Leo Ferry. The agent's report contains the following information with respect to this transfer:

"It appears from the statements to me by Peter Leo Ferry, James L. Ferry and Catherine B. Ferry

(Defendant's Exhibit F)

that this stock was given to the said Peter Leo Ferry, by the decedent, out of his block of stock in said bank in order to induce him to remain as an employee of said bank and not leave the bank as he intended to do. The stock was delivered in person to said son on the date named above and he at all times has had possession of it. The stock has never paid a dividend and was transferred of record in stock book of said bank at time of gift."

The following statement appears under Schedule E of the return:

"The donee was employed and is now employed by the aforesaid bank and it was therefore given to him in order to secure his position and enhance his prospects for advancement."

The decedent's illness was definitely diagnosed as cancer on August 29, 1934. However, irrespective of the condition of the decedent's health, it is believed that the estate has overcome the presumption that this small transfer was made in contemplation of death and it is recommended that this transfer be excluded from the gross estate.

The decedent was domiciled in the State of California. He left surviving a widow and six or seven children. Four of the trusts were created in the year 1925 and one trust was created in the year 1930. All of the five trusts were in existence at date of death. In all five of the trust agreements the decedent's wife was named as one of the trustors. However, there was not any prior conveyance to the wife of any of the trust property and the widow informed the agent that she never inherited

(Defendant's Exhibit F)

any property and did not contribute any property to the trusts. In the estate tax return filed by the executrix the following statement appears:

"It is further contended that the interest retained by Catherine B. Ferry in the trusts hereinbefore

12—Estate of Peter Ferry

set forth was not transferred to her by decedent but represents the community property acquired by decedent and Catherine B. Ferry since their marriage.

* * * That it was necessary, and affiant, Catherine B. Ferry, did, join in the creating of these trusts, hereinbefore set forth and in so creating these instruments affiant received only that which was already her property pursuant to the laws of the State of California."

It is contended in the estate's protest, and such contention was argued at the hearing, that the five trusts were made in pursuance of a property settlement agreement between the decedent and his wife. There has not been a scintilla of evidence submitted to substantiate such contention. The representatives of the estate give great weight to the fact that the wife joined as a trustor in all of the trust agreements and urge that she was a transferor of one-half of the property. The community interest of the wife in California (except as provided in section 161(a) of the Civil Code of California, which exception is not applicable here) is an expectancy, and while it may have been necessary for the wife to join in the trust so as to release her expectancy interest in community property, such a release and conveyance by the wife does not constitute a transfer to the trusts by the

(Defendant's Exhibit F)

wife for an adequate and full consideration in money or money's worth. In *Mercantile Trust Company v. Hellmich*, District Court of United States for the Eastern District of Missouri, C. B., June 1924, page 473, it was held that the joinder by the wife in a trust created by the husband, while an effective release of the wife's dower interest, did not constitute a conveyance by the wife for an adequate and full consideration in money or money's worth.

In *Fish v. Commissioner*, 27 B. T. A. 1002, affirmed by United States Court of Appeals for the District of Columbia, C. B., June 1925, page 392, a California case, involving transfers made by husband and wife jointly, the Board of Tax Appeals said:

"By joining in the conveyance in September 1924 Mrs. Fish relinquished her right to receive one-half of the community property upon the death of Mr. Fish, thereby effectively converting the community property into the separate property of the husband (*Paduweris v. Paris*, *supra*) who eo instanti made gifts of the same property to Mrs. Fish and their children. By

13—Estate of Peter Ferry

those gifts Mrs. Fish acquired an interest vesting in praesenti, instead of an interest vesting in futuro which she theretofore had. Her consent to the gifts was not the equivalent of a purchase of one-half of the property, but a relinquishment of her interest in the other half."

(Defendant's Exhibit F)

In affirming the decision of the Board of Tax Appeals in the Fish case, the court of appeals said:

"Exactly what interest a wife has in real estate during her husband's life under that and similar statutes in California has been much litigated in that State, and we find it difficult to ascertain from the cases to which we have been referred.

"From the later cases it appears to be an expectancy plus, but to what extent plus is not clear * * * but whatever else it may be, her community estate is certainly a statutory substitute for dower, and, consequently, falls within the expressed provisions of the taxing act controlling this matter. * * * For her signature to such a deed, a wife may—and she frequently does—exact a consideration, but there is no evidence in this record that Mrs. Fish did so, or that either she or her husband intended that her signature to the deed to their children should serve as a valuable consideration for the deed to herself."

Even if it should be shown satisfactorily that the wife actually exacted as a valuable consideration for the release of her community interest in the property of the decedent, the interest received by her as a beneficiary under the trust, the value of such consideration is not deductible from the value of the trust property in view of the provisions of section 804 of the Revenue Act of 1932 to the effect that the relinquishment of dower or a statutory estate created in lieu of dower, shall not to any extent be considered as a consideration in money or money's worth.

(Defendant's Exhibit F)

Section 2280 of the Civil Code of California provides as follows:

"A trust can not be revoked by the truster after its acceptance, actual or presumed, by the trustee and beneficiaries, unless the declaration of trust reserves

14—Estate of Peter Ferry

a power of revocation to the truster, and in that case the power must be strictly construed."

The power reserved by the decedent, with the consent and approval of his wife and a majority of the beneficiaries, to alter, amend or revoke the several trusts, is a right that the decedent would not have had under the local law if such power had not been specifically reserved.

It is further contended by the estate that if the decedent had obtained the consent of his wife and a majority of the beneficiaries and had revoked the trusts, the trust property would have then been owned by the decedent and wife as tenants in common, in view of the fact that the wife was named as one of the trustors.

Trust No. S-5869 provides that upon revocation the trust property "shall vest in and be conveyed, transferred and delivered, discharged of any trust, to the trustors, if they are both living, and if Peter L. Ferry alone of the trustors be living, then to him."

Trust No. 6204 provides "that upon such revocation taking effect that said trustors, or the survivor of them, shall take and accept the trust estate."

(Defendant's Exhibit F)

Trust No. SS-4358 and trust No. 1052 could not be revoked absolutely but could only be altered or amended or the beneficiaries changed.

Trust No. 2012 did not contain any provision for distribution upon revocation during decedent's lifetime.

If trusts Nos. 6204 and S-5869 had been revoked during the lifetime of the decedent, the property would have probably been owned by the decedent and wife as joint tenants as the provision for the property going to the survivor of the trustors would preclude the creation of a tenancy in common. Trusts Nos. SS-4358 and 1052 could not be revoked but could only be altered and amended and, therefore, no tenancy in common could result from any change. Therefore, as to four of the trusts the estate's contention as to the creation of a tenancy in common upon revocation, is not well founded.

15—Estate of Peter Ferry

Conceding for the sake of argument, but not admitting the estate's contention in this respect, the fact remains that the trusts which could have been revoked, were not revoked, and the wife did not acquire during decedent's lifetime a one-half vested interest as a tenant in common. Furthermore, the right to include the trusts in the gross estate does not depend entirely upon the reserved right of revocation. The rights reserved to change, alter and amend are alone sufficient to include the transfers under section 302(d) of the Act.

The entire amounts of trust No. 6204 and trust No. 1052 are includible under the provisions of article 15, Estate Tax Regulations 80, as amended by Treasury Decision 4729, as these trusts provided that the entire in-

(Defendant's Exhibit F)

come shall be payable to the trustors jointly during their lifetime and upon the death of either then to the survivor during his or her lifetime.

Mr. Luce, the attorney representing this estate, admits that one-half of all of the trusts is includible in the gross estate under the provisions of section 302(d), and as the decedent did not reserve more than one-sixth of the income from the other three trusts, it is not necessary to determine what portion of the other three trusts is includible under the provisions of section 803 of the Revenue Act of 1932.

As the trusts were created after the effective date of the Revenue Act of 1924 and the decedent reserved the power to alter, amend or revoke with the consent of less than all of the beneficiaries, the transfers were properly included in the gross estate in the 30-day letter, and no adjustment is recommended.

Deductions

	Returned	Tentatively Determined	Proposed Determination
	<hr/>	<hr/>	<hr/>
Funeral expenses \$	611.14)		\$ 614.11
Executors' commis-			
sions	409.38)		409.38
Attorneys' fees	409.38)		500.00
Miscellaneous admin-	)	\$9,909.60	
istration expense	1,820.27)		1,820.27
Debts of decedent	10,876.01)		9,876.01

(Defendant's Exhibit F)

16—Estate of Peter Ferry

In the 30-day letter the deductions allowed for debts and charges of the estate were limited to the value of the probate assets. Item 1 of schedule I, representing a doctor's bill, is disallowed for the reason that the agent advised that this bill was paid by the decedent's son prior to the date of death and no evidence has been submitted to show that the son will file a claim for reimbursement.

Trust No. 6204 authorizes the trustee to pay any assessments of taxes which may be levied against the trustors and his or her property, expenses of last illness and funeral expenses of the trustors, and other expenses of every kind and nature expended or incurred in the management and protection of the trust property.

The largest item of debts is item 14, which represents a claim of Frank Diener in the sum of \$7,289.59, which was filed in the probate court and allowed by the court. This claim is made up of a long list of expenses incurred by Frank Diener in the operation of a ranch under instructions from the decedent. This ranch is included as an asset of trust No. 6204. It is believed that this claim is a lien on the trust assets and it is recommended that it be allowed as a deduction. If not allowable as a claim against the estate it should be considered as a reduction in the value of trust No. 6204.

The estate has paid the entire net tax as tentatively determined after allowance of credit for State estate, inheritance, legacy or succession taxes. The evidence in support of the credit claimed for such taxes has not yet been received. The entire net deficiency has been assessed pursuant to the several payments made. Accordingly, if the credit is allowed, there will be a small refund due to

(Defendant's Exhibit F)

the allowance of the deductions herein recommended and the elimination from the gross estate of the transfer of the First National Bank stock.

Mr. Luce stated that he proposed to contact the representatives of the estate and if they were agreeable to the proposition, he would submit by January 1, 1938, an offer to settle this case on the following basis:

(1) Estate to concede inclusion of all of the insurance.

(2) Estate to concede inclusion of three-fourths of the value of the five trusts.

(3) The Bureau to concede the allowance of all proper deductions.

17—Estate of Peter Ferry

Mr. Luce stated that in view of the large amount of tax involved he would like to have this case considered by the Committee in the event his offer is not acceptable.

In the opinion of the writer such an offer of settlement, if made, should not be accepted.

The estate's offer of settlement was received January 7, 1938.

Carl Palmer
C. Palmer, Conferee,
Adjustment Section.

Approved:

A. T. Cusack

~~A. M. Blaisdell,~~

Asst. Chief, Adjustment Section.

H. K. Melcher

H. K. Melcher,

Head, Estate Tax Division.

(Defendant's Exhibit F)

cc Collector

Agent

cc Claude I. Parker, Atty.,

808 Bank of America Bldg.

Los Angeles, California.

MT-ET-7738-6th California

Estate of Peter Ferry

Date of death—June 16, 1935

Catherine B. Ferry, Executrix,

3030 N. Chevy Chase,

Glendale, California.

Madam:

Reference is made to the claim on Form 843 filed on February 9, 1939, on behalf of the above-named estate for the refund of \$63,825.77, Federal estate tax paid, "or such greater amount as is legally refundable with interest." The claim involves two issues, first, as to whether the amount of \$32,561.48, representing proceeds of insurance payable to beneficiaries other than the estate in excess of the \$40,000.00 exemption, should be included in the gross estate of the decedent; and the other as to whether the amount of \$610,837.45, representing property transferred prior to the enactment of section 161(a) of the California Code, is includible in the gross estate to the extent of the entire corpus thereof on the basis of the terms of certain trust instruments.

With respect to the first issue you contend that the life insurance policies should not be taxed in full, but an allowance should be made of the claimed community interest stated to be vested in you. You rely on the case

(Defendant's Exhibit F)

of *Lang v. Commissioner*, 304 U. S. 264 (20 A.F.T.R. 1251) and the case of *Elizabeth C. McCoy, Administratrix*, 37 B. T. A. 114.

The Bureau has considered the cases cited and is of the opinion that they are not controlling in this case. It appears that all of the policies in this case were taken out by the decedent upon his own life. They were the usual standard form of policy, giving him legal incidents of ownership such as changing the beneficiary, assignment and the like. They thus come within the express wording of Article 25 of Estate Tax Regulations 80. ~~The Bureau's position in this case is supported by the decision of the court in the case of Newman v. Commissioner, 76 Fed. (2d) 449.~~

No evidence has been submitted showing that any part of the premiums was paid out of community funds.

2—Estate of Peter Ferry

With respect to the second issue you contend that the six trusts are taxable only to the extent of one-half because the establishment of the trusts amounted to a property settlement between the decedent and yourself, giving you a vested interest therein.

It appears that the corpus of all six of the trusts was acquired by the decedent during coverture prior to the enactment of section 161(a) of the California Civil Code giving the wife a vested interest in the community. Prior to the enactment of this section of the Code, the wife had a mere expectancy in the community. The rights of the husband were so complete that the husband was the owner of the community. *U. S. v. Robbins*, 269 U.S. 315. The fact that the wife became a cotrustor is there-

(Defendant's Exhibit F)

fore without significance or effect. She contributed nothing of her own and her participation was a mere formality.

It is contended that the legal effect of these trusts was to constitute the wife a tenant in common with her husband in the corpus thereof. There is nothing to indicate that the wife acquired any additional property or property rights by becoming a signatory to the trust instru-

It may be assumed without conceding that upon revocation of
ments. ~~Had~~ any of the trusts ~~been revoked~~, by the
by the terms of the instruments
terms of the instruments the corpus ~~^~~ would have become the property of the trustors, in which event ~~an~~
estate of a tenancy in common might have been created. However, none of the trusts was revoked during the decedent's lifetime.

The fact remains that the transfers were made by decedent after the enactment of the Rev. Act of 1924, and the

~~The~~ decedent ~~had~~ also reserved the power, to alter, revoke or amend the trusts, with the concurrence of certain ~~^~~ of the beneficiaries,

and such power was in existence at the date of decedent's death. The transfer therefor came within Sec. 302(d) of the Rev. Act of 1926.

Article 20(a), Regulations 80 (1937 Edition) provides that all trusts are subject to tax when the transfer was made after the enactment of the Revenue Act of 1924 and before the amendment of the subdivisions by the

(Defendant's Exhibit F)

Revenue Act of 1934 became effective, and the decedent's death occurred at any time subsequent to the transfer, with powers of revocation reserved to the decedent, alone or with others, having or not having a substantial adverse interest in such property.

The wife contributed nothing to the trusts. She had no interest in the trust property other than the life estate given her in certain of the trusts. The decedent reserved the power to alter, amend and revoke the trusts with the consent of others having substantial adverse interests in the property. Accordingly, the property, or corpus, of all six trusts is includible in the gross estate of the decedent.

3—Estate of Peter Ferry

On the basis of the foregoing, and since there does not appear to be an overpayment of Federal estate tax in this case, the claim filed on February 9, 1939, for the refund of \$63,825.77 is rejected in its entirety.

Respectfully,

Guy T. Helvering,
Commissioner.

By

D. S. Bliss,
Deputy Commissioner.

(Defendant's Exhibit F)

Los Angeles, Calif.

San Francisco, Calif.

Washington, D. C.

CLAUDE I. PARKER

Attorney at Law

937 Munsey Building

Washington, D. C.

National 5623

[Stamped]: Internal Revenue Miscellaneous Tax Unit
Feb 18 1938. Received Feb 19 1938 Appeals & Review
Sect. Received Feb. 19 1938 Estate Tax Division

February 18, 1938.

Hon. D. S. Bliss,

Deputy Commissioner of Internal Revenue,

Washington, D. C.

In re: Estate of Peter Ferry.

MT-ET-7738 6th California.

Sir:

On January 7, 1938, the undersigned, in behalf of the Estate, submitted an offer of settlement in the above matter. On January 22, 1938, your office issued a letter to the executors in my care, stating that the offer of settlement could not be accepted and proposed a deficiency of \$26,514.35 in estate tax, indicating however that there would be an overassessment of estate tax in the amount of \$1,796.47 when the proper proof of the payment of California State inheritance taxes was submitted.

Thereafter this proof was submitted and on February 5, 1938, your office notified me and the Executors that

(Defendant's Exhibit F)

a certificate of overassessment would be issued in due course.

The issue which this office proposed to settle in our letter of January 7, 1938, will, in our opinion, by reason of the law of the State of California, be finally decided by the Courts or the Board of Tax Appeals in our favor. This question involves the inclusion in the gross estate by your office of the entire corpus of several trusts. We offered to settle this issue, which was the main issue in the case, by agreeing that three-fourths of said corpus be included and only one-fourth thereof excluded from the gross estate.

In view of the legal features involved it is requested that this matter be considered by your Committee on Appeal and Review. Also we wish to refer in this matter to the case of *Ida P. Goodyear, Executrix of the Estate of W. E. Goodyear, Deceased, v. United States*, No. 7561-C, District Court of the United States for the Southern District of California, Central Division. We think that the memorandum decision of the Court in that case is most helpful in sustaining our position in the instant case.

Therefore, it is requested, as above, that this matter be reconsidered by your Committee on Appeal and Review and that the undersigned be granted the privilege of a conference by that Body.

Respectfully,

L. A. Luce.

(Defendant's Exhibit F)

February 21, 1938.

MT-DC-ET-7738-6th California

Estate of Peter Ferry

Date of death—June 16, 1935

[Written]: To Mar. 23 - 10 A. M. thru G. S. 3-8-38
L. A. Luce, Attorney,

Munsey Building,
Washington, D. C.

Sir:

In compliance with your request, a hearing has been tentatively arranged in the above-named case, to be held on March 15, 1938, at 10 a. m., in Room 6237, Internal Revenue Building, Twelfth Street and Constitution Avenue, Northwest, Washington, D. C. Any objection to this date should be made within ten days after the receipt of this notice. In the absence of objection, the tentative date will be deemed agreeable to you and the hearing scheduled accordingly. Should the executor, either in person or by his duly authorized attorney or agent, fail to appear on the date scheduled, the case will be disposed of on the record.

It is the policy of the Bureau to close all estate tax cases within one year from the date the return is filed. Accordingly, executors or their representatives granted a hearing should endeavor to conform to the Bureau's

(Defendant's Exhibit F)

schedule. It is customary to grant but one hearing in each case. After a hearing is scheduled, no postponement will be granted except in cases of unavoidable necessity. All evidence must be filed at least five days prior to the hearing. Additional time will be allowed in which to file supplemental briefs or additional evidence only in respect to an issue that could not reasonably have been anticipated prior to the hearing.

Attorneys and agents representing clients before the Bureau must be enrolled to practice before the Treasury Department, file a power of attorney and otherwise conform to the requirements of Department Circular 230 (Revised September 15, 1936).

In order that the work of the Bureau may proceed uninterruptedly, the schedule of its work must be conformed to with a minimum of variation therefrom. To this end the cooperation of taxpayers and their representatives is urgently solicited.

Respectfully,

(Signed) D. S. Bliss

D. S. Bliss,

Deputy Commissioner.

AGF

(Defendant's Exhibit F)

Claude I. Parker

Telephone

Ralph W. Smith

Michigan 1451

Washington, D. C. Office

937 Munsey Building

PARKER AND SMITH

Attorneys and Counselors at Law

8th Floor Bank of America Building

650 South Spring Street

Los Angeles

January 12, 1940.

In Reply Refer to

J. Everett Blum.

Exhibit "A" Estate of Peter L. Ferry

Dist-6th Calif. Date of death 6-16-35

Mr. Nat Eddy

Internal Revenue Agent

12th Floor U. S. Post Office and Court House Bldg.

Los Angeles, California.

In re: Estate of Peter L. Ferry

Dear Mr. Eddy:

Confirming our conversation of today, I will have in your hands on or before January 26, 1940, the data necessary to support the claim that a portion of the premiums paid on the insurance policies listed in the Federal estate tax return filed herein were paid out of community property of Mr. and Mrs. Ferry, acquired after June, 1927.

Sincerely yours,

PARKER AND SMITH

By J. Everett Blum

JEB:F

(Defendant's Exhibit F)

STATEMENT OF PROTEST

WITH RESPECT TO

DEFICIENCY CLAIMED IN FEDERAL ESTATE
TAX PROPOSED TO BE ASSESSED AGAINST
CATHERINE B. FERRY, EXECUTRIX OF
THE ESTATE OF PETER FERRY, WHO DE-
CEASED JUNE 16, 1935; AND

STATEMENT OF PROTEST

WITH RESPECT TO PROPOSED ACTION ON
CLAIM FOR REFUND FILED BY EXECU-
TRIX OF THE AFORESAID ESTATE.

[Stamped]: Received Apr 4 1940 Internal Revenue
Agent in Charge Los Angeles Division

Los Angeles, California,
April 5, 1940.

Hon. Guy T. Helvering,
Commissioner of Internal Revenue,
Washington, D. C.,

Through the Office of the Internal Revenue Agent
in Charge,
Los Angeles, California.

Sir:

Receipt is acknowledged of your letter bearing date
February 20, 1940, carrying symbols MT-ET, bearing sig-
nature of George D. Martin, Internal Revenue Agent in
Charge, which letter authorizes taxpayer, if dissatisfied
with the tentative decision of the Commissioner of In-
ternal Revenue therein made, to file within a period of
thirty days her protest.

(Defendant's Exhibit F)

Receipt is also acknowledged of your letter bearing symbols above given, in which the time for filing said protest is extended for a period of fifteen days or, to wit, until the 5th day of April, 1940.

Protestant expresses her appreciation for the privilege of being permitted to register her dissatisfaction with the proposed determination of the Commissioner and for the extension granted within which to file this protest.

Protestant is dissatisfied with the proposed determination and assigns errors specifically as follows:

First: That the Commissioner has erred in increasing the gross estate by including therein certain trusts specifically set out in the Commissioner's letter of August 4, 1937.

Second: That the Commissioner erred in increasing valuations of items of insurance as set out in his said letter of August 4, 1937.

Third: That the Commissioner erred in refusing to allow the full amount of deductions shown in the Federal Estate Tax Return filed and in allowing only the amount of deductions to the extent of the value of the probate estate.

That with respect to "First" and "Third" all of the statements contained in protest dated October 29, 1937, and heretofore filed, protesting the determinations made in your letter of August 4, 1937, together with all of the allegations contained in claim for refund executed and dated on or about February 10, 1939, and filed on or about February 20, 1939, are herein realleged and incorporated as though fully set forth herein and thereby made a part hereof.

(Defendant's Exhibit F)

That in addition, your protestant refers to the case of Hill, 24 B.T.A. 1144, and the decisions of the California Courts therein cited.

That with respect to the second error herein assigned your petitioner alleges that the premiums paid for the insurance policies included in decedent's Federal Estate Tax Return and set forth in your letter of August 4, 1937, were paid for out of the community income of decedent and his wife acquired from and after July 29, 1927, and from the separate property of decedent and from the separate property of decedent's wife. That in that connection the facts are:

Decedent owned and operated a business known as Peter L. Ferry, which business carried on a street paving enterprise. That Peter L. Ferry carried on said business as the sole proprietor and as an individual. That the total value of all assets of the business on February 29, 1927 was not in excess of \$25,000.00. That the physical assets of the business play a very minor part in the income produced by said business and received by said decedent. That the major factor in producing income from said business was the experience in said business of Peter L. Ferry, his contacts in getting the business, and his ability to carry out the contracts, his reputation in the business and his personal skill.

That all of the income derived by said Peter L. Ferry from the street paving and contracting business should be assigned to his personal services and none thereof to the physical assets of the business.

The said Peter L. Ferry and his wife carried a joint bank account at all times herein material, into which were deposited the community earnings of Peter L. Ferry and

(Defendant's Exhibit F)

his wife, the separate earnings of his wife, and his own separate income. That from said joint bank account were paid all of the bills of decedent and his wife. That the amount of money in said bank account on August 1, 1927 was \$5,650.23.

That for the year 1928 Mrs. Peter L. Ferry filed a separate income tax return showing thereon income of \$22,474.71. That Peter L. Ferry filed a separate income tax return for the year 1928 showing income thereon of \$31,068.38.

For the year 1929 Mrs. Peter L. Ferry filed separate income tax return, showing income of \$7,408.55, and Peter L. Ferry filed separate income tax return for said year showing income of \$11,755.11.

That for the year 1930 Mrs. Peter L. Ferry filed separate income tax return showing income of \$10,388.50, and Peter L. Ferry filed separate income tax return for said year, showing income of \$10,422.12.

For the year 1931 Mrs. Peter L. Ferry filed separate income tax return showing income of \$6,167.30, and Peter L. Ferry filed separate income tax return showing income of \$78.95.

For the year 1932 Mrs. Peter L. Ferry filed separate income tax return showing income of \$5,618.63, and for said year Peter L. Ferry filed separate income tax return showing loss of \$219.15.

For the year 1933 Mrs. Peter L. Ferry filed separate income tax return showing a loss of \$709.03, and Peter L. Ferry filed separate income tax return for said year showing income of \$2,026.40.

(Defendant's Exhibit F)

For the year 1934 Peter L. Ferry and Mrs. Peter L. Ferry filed a joint return showing a loss of \$24,702.20.

For the year 1935 separate returns were filed by Mrs. Peter L. Ferry and Peter L. Ferry. That the return of Peter L. Ferry showed a loss of \$32,714.90. That the copy of the return of Mrs. Peter L. Ferry for the year 1935 has not been located, although diligent search has been made therefor, and the figures thereon can not at this time, therefore, be given.

That during the time in which the Commissioner of Internal Revenue would not allow a division of California community income to be divided between a husband and wife, decedent included in his return all of the community income. However, from records of said decedent, protestant is informed and believes and therefore alleges that decedent filed claims for refund with respect thereto, but decedent has no information upon which to base an allegation as to the outcome thereof and therefore respectfully directs your attention to the records of the Commissioner of Internal Revenue with respect to the action taken by the Commissioner on said claim or claims for refund. Protestant assumes that copies of decedent's and Mrs. Peter L. Ferry's income tax returns are available to the examining officer, but will be glad to show taxpayer's retained copies of the income tax returns referred to herein to the examining officer.

Premiums were paid on the insurance policies from the bank account of decedent and his wife in the American National Bank of Glendale, California, and the First National Bank of Glendale. That your protestant will furnish to the examining officer a statement of the payment of premiums on each of the insurance policies upon his re-

(Defendant's Exhibit F)

quest, showing payment of premiums from and after July 29, 1927 to the date of decedent's death.

From the foregoing, your protestant alleges that a sum greatly in excess of the amount claimed in the Federal Estate Tax Return should be excluded from the gross amount of insurance payable by reason of the death of said decedent. That your protestant is desirous of cooperating fully with your office and will attempt to furnish such additional information as your examining officer may deem necessary, in so far as her ability will provide.

In conclusion, your protestant submits that only one-half of the corpus of the said trusts should have been included in decedent's gross estate; that a sum greatly in excess of that claimed in the Federal Estate Tax Return should have been excluded from the insurance payable by reason of decedent's death; that the deductions taken by the estate of decedent should have been allowed in full and should not have been limited to the amount of debts and deductions payable out of said probate estate.

Protestant assumes that with the additional certificate showing the total amount of inheritance tax paid or payable to the State of California, that the alleged deficiency shown in your letter of February 20, 1940 will be eliminated.

From the foregoing, therefore, it is urgently requested that reconsideration be made by your office with respect to the proposed determinations incorporated in your letter of August 4, 1937, and the proposed determinations reported

(Defendant's Exhibit F)

in your letter of February 20, 1940, and that a statement of protest of protestant dated October 29, 1937, and the claim for refund heretofore filed herein, and this protest be given your deep consideration and that upon such reconsideration in the light of the foregoing, protestant's claim be allowed.

Protestant desires an oral hearing.

Respectfully submitted,

CATHERINE B. FERRY,

Catherine B. Ferry

Executrix of the Estate of Peter Ferry, Deceased.

Claude I. Parker

CLAUDE I. PARKER

Ralph W. Smith

RALPH W. SMITH

J. Everett Blum

J. EVERETT BLUM

808 Bank of America Building,

Los Angeles, California,

Attorneys for Executrix of said Estate.

Of Counsel:

L. A. Luce

L. A. LUCE

937 Munsey Building,

Washington, D. C.

(Defendant's Exhibit F)

State of California

County of Los Angeles—ss.

Catherine B. Ferry, being first duly sworn, deposes and says: that she is the duly appointed, qualified and acting Executrix of the Estate of Peter L. Ferry, deceased, and is the taxpayer named in the foregoing Statement of Protest and that she has read the said protest and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information and belief, and as to those matters that she believes it to be true.

Catherine B. Ferry.

Subscribed and sworn to before me this 5th day of April, 1940.

Verna Frantz

Notary Public in and for the County of
Los Angeles, State of California.

CERTIFICATE

I hereby certify that the foregoing protest was prepared by me for and on behalf of taxpayer; that the facts recited in said protest are the exact facts as given to me by the taxpayer and to the best of my knowledge and belief are true and correct.

Dated at Los Angeles, California, this 5th day of April, 1940.

J. Everett Blum

With CLAUDE I. PARKER AND
RALPH W. SMITH

808 Bank of America Building,
Los Angeles, California.

(Defendant's Exhibit F)

Los Angeles, California

May 27, 1940

[Stamped]: Received May 28 1940 Internal Revenue
Agent in Charge Los Angeles Division

Internal Revenue Agent in Charge,
Los Angeles, California.

In re: Estate of Peter Ferry

Name of taxpayer

808 Bank of America Bldg.

Address of taxpayer

MT-ET-6th Calif.

~~Year(s)~~ involved

In the absence of an agreement with your office as to my tax liability, it is requested that the above case be referred for a hearing before the Los Angeles office of the Pacific Division of the Technical Staff. It is understood that the Technical Staff will not consider substantial issues or important evidence which have not been previously presented to your office.

J. Everett Blum

Signature (taxpayer or enrolled attorney)

808 Bank of America Bldg.

Address (taxpayer or enrolled attorney)

(Defendant's Exhibit F)

Estate Tax Recharge Slip

Estate of Ferry

District of 6 Cal

File No. 7738

Date 9-10

Recharge

From FB

To Tech Staff
for post review

131M

MT-ET-7738-6th California

Estate of Peter Ferry

Date of Death—June 16, 1935

Sep 11 1940

Memorandum for:

Mr. A. R. Marrs,
Head, Technical Staff.

The administrative file of the above-named estate is forwarded herewith for post review. When the review is completed, please return the file to this office.

(Signed) D. S. Bliss
D. S. Bliss,
Deputy Commissioner.

Incl. 13091

FB

(Defendant's Exhibit F)

MT-ET-7738-6th California

Estate of Peter Ferry

Date of Death—June 16, 1935

Sep 11 1940

Memorandum for :

Mr. A. R. Marrs,

Head, Technical Staff.

The administrative file of the above-named estate is forwarded herewith for post review. When the review is completed, please return the file to this office.

D. S. Bliss

D. S. Bliss,

Deputy Commissioner.

Incl. 13091

[Stamped]: Received Sep 11 1940 Technical Staff

(Defendant's Exhibit F)

Mr. Storz

Attention: F G W

Kindly value trusts under Schedule E in accordance with the attached appraisal of Preston H. Leslie and return the case to

GCW

Valued 7-12-37

FGW

Peter L. Ferry

T. G. & T. Co. Trust S-1080

As at June 16, 1935

Cash	.01
------	-----

Real Estate

Tract 6699

L 20	\$550.00
L 21	450.00
L 22	450.00
L 23	450.00
L 24	450.00
L 25	450.00
L 26	450.00
L 27	450.00
L 28	450.00
L 29	450.00
L 30	450.00
L 31	450.00

(Defendant's Exhibit F)

L 32	450.00
L 33	450.00
L 34	1400.00
L 35	400.00
L 36	400.00
L 63	600.00
L 64	500.00
L 65	375.00
L 66	400.00
L 67	200.00
L 68	125.00
L 69	250.00
L 70	400.00
L 71	500.00
10.9 Ac. — as per desc.	15000.00
	<hr/>
Total	\$26950.01
	<hr/> <hr/>

All property clear

Interest of decedent and

Catherine D. Ferry — as J/T (10%) \$2695.00

Statement of Assets in Trust S-1080

As of June 16, 1935, Date of Death of Peter L. Ferry

Lots 20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-
63-64-65-66-67-68-69-70-71 All in Tract 6699 —
Unsold

(Defendant's Exhibit F)

10.90 acs (Ex of R/W's) Com. at SW corner of Tract 6699, Th NW to most West corner said Tract, Th S 89° 50' 40" E to W line of Exchange St., Th N 284.77' Th S 66° 45' W 310.25' Th N 23° 15' W 185', Th S 66° 45' W to E line of Griffith Park, Th S E along said line to SW corner West Glendale, Th E 436.62' to beginning.

Summary

Cash on hand — Principal	\$ 6,647.78
Cash on hand — Income	1,749.56
	<hr/>
Total Cash	\$ 8,397.34
Secured Promissory Notes	103,754.84
Participation Certificates	14,435.00
Street Improvement Bonds	434.48
	<hr/>
Total Assets held at June 16, 1935	\$127,021.66
Interest accrued to June 16, 1935	938.53
	<hr/>
Total	\$127,960.19
	<hr/> <hr/>
Total	\$126,628.85

-6-
PETER L. FERRY AND CATHERINE B. FERRY

ASSETS HELD BY TITLE GUARANTEE AND TRUST COMPANY

TRUSTEE UNDER TRUST P-1052

June 16, 1935

CASH - Principal
Income

Total Cash

SECURED PROMISSORY NOTES

1 Note dated June 15, 1934 for \$2,500.00 made by Walter M. Barley, Jr. and Elvira Barley, due June 15, 1937 with interest at 6% payable \$25.00 including principal and interest on the 15th day of each month. Said note is secured by a Trust Deed dated June 15, 1934, recorded in Book 12850, Page 303 of Official Records and covering the South 50' of the West 157.62' of Lot 139, Romona Acres Plat No. 2, as recorded in Book 11, Page 50 of Maps, in the office of the County Recorder, County of Los Angeles, California

Balance due on principal
Accrued interest 6/15 to 6/16/35 @ 6%

2 Note dated February 15, 1934 for \$3,500.00 made by Mary M. Bradford and S. Case Bradford, due February 15, 1937 with interest until maturity at 7% payable quarterly; principal payable \$300.00 February 15, 1935 and 1936. Said note is secured by a Trust Deed dated February 14, 1934, recorded in Book 12673, Page 7 of Official Records and covering a portion of Lots 4 and 5 of the Hardison Tract as per map recorded in Book 7, Page 170 of Maps in the office of the County Recorder of Los Angeles County, State of California

Balance due on principal
Accrued interest 2/15 to 6/16/35 @ 7%

3 Note dated July 1, 1932 for \$1,600.00 made by Lou Ellen Callahan and Lee Callahan, due July 1, 1935 with interest until maturity at 7% payable quarterly. Said note is secured by a Trust Deed dated July 1, 1932, recorded in Book 11758, Page 13 of Official Records and covering Lot 260 of Tract No. 1615, as per map recorded in Book 20, Page 104 of Maps in the office of the County Recorder of Los Angeles County, State of California

Balance due on principal
Accrued interest 4/1 to 6/16/35 @ 7%

Note dated November 21, 1934 for \$1,000.00 made by Mary Alice Colestock and Grace M. Colestock. On November 21, 1937 with interest at 6% payable 7% in 1941, principal and interest to be paid in 1941. Said note is secured by a Trust deed dated November 21, 1934, recorded in Book 1247, Page 371 of Official Records and covering Lot 14 of Tract No. 721 as per map recorded in Book 12, Page 17, 18 and 19 of maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 7/1 to 8/15/35 7

Note dated November 1, 1931 for \$1,000.00 made by William J. DeFord and December 1, 1934 and January 1, 1935, with interest at 7% payable quarterly. Said note is secured by a Trust deed dated November 1, 1931, recorded in Book 1247, Page 307 of Official Records and covering Lot 1 of the 12 section Tract No. 721 as per map recorded in Book 12, Page 17 of maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 7/1 to 8/15/35 7

Note dated July 15, 1931 for \$4,000.00 made by W. J. DeFord and William J. DeFord with interest at 7% payable 6%. Said note is secured by a Trust deed dated July 15, 1931, recorded in Book 1247, Page 307 of Official Records and covering Lot 20, Tract No. 6800 as per map recorded in Book 70, Page 14 of maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 7/15 to 8/15/35 7

Note dated December 1, 1933 for \$2,800.00 made by Frederick S. DeFord and Margaret DeFord and December 1, 1936 with interest until maturity at 6% payable quarterly. Said note is secured by a Trust deed dated December 1, 1933, recorded in Book 1247, Page 307 of Official Records and covering Lot 13, Tract No. 684 as per map recorded in Book 12, Page 123 of maps in the office of the County Recorder of the County of Los Angeles, California.

Unpaid balance
Accrued interest 6/1 to 6/16 6

9
Note dated January 1, 1931 for \$1,095.21 made by Jack Emmott and Annie Emmott with interest at 7% payable \$15.00 including principal and interest on the 15th day of each month. Said note is secured by a Trust Deed recorded in Book 10514, Page 305 of Official Records and covering Lot 198 of the Durley Park Tract as per map recorded in Book 20, Pages 94 and 95 of Maps in the office of the County Recorder of Los Angeles County

Balance due on principal
Accrued interest 5/15 to 6/16/35 @ 7%

2
Note dated July 8, 1932 for \$1,800.00 made by William C. Goetz and Rae A. Goetz due July 8, 1935 with interest until maturity at 7% payable quarterly. Said note is secured by a Trust Deed dated July 8, 1932 recorded in Book 11609, Page 157 of Official Records and covering Lots 21 and 22, Block 1, Tract No. 4307 as per map recorded in Book 47, Page 44 of Maps in the office of the County Recorder of Los Angeles, California

Balance due on principal
Accrued interest 4/8 to 6/16/35 @ 7%

7
Note dated May 5, 1932 for \$2,500.00 made by William E. Halstead and Essie E. Halstead due May 5, 1935 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated May 5, 1932, recorded in Book 11673, Page 109 of Official Records and covering Lot 44, Tract 393 as per map recorded in Book 14, Page 154 of Maps in the office of the County Recorder of Los Angeles, California

Balance due on principal
Accrued interest 5/5 to 6/16/35 @ 7%

7
Note dated May 5, 1932 for \$500.00 made by William E. Halstead and Essie E. Halstead due May 5, 1935 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated May 5, 1932, recorded in Book 11673, Page 109 of Official Records and covering Lot 44, Tract No. 393 as per map recorded in Book 14, Page 154 of Maps in the office of the County Recorder of Los Angeles, California

Balance due on principal
Accrued interest 5/5 to 6/16/35 @ 7%

Note dated January 1, 1931 for \$1,725.17 made by Sadis S. Selby and Bertrude S. Selby with interest at 7% payable \$25.00 including principal and interest on the first day of each month. Said note was later assumed by Bertha Hanford and is secured by a Trust Deed dated January 1, 1931, recorded in Book 10500, Page 241 of Official Records and covering Lot 10, Serra Vista Annex as per map recorded in Book 7, Page 131 of Maps in the office of the County Recorder of Los Angeles, California

Balance due on principal
Accrued interest 6/1 to 6/16/35 7%

1,20

Note dated February 18, 1934 for \$2,400.00 made by Jack Henry due February 18, 1937 with interest at 7% payable \$75.00 including principal and interest on the 18th day of each month. Said note is secured by a Trust Deed dated February 18, 1934, recorded in Book 12671, Page 75 of Official Records covering Lot 24, Block 12, Palisades Street No. 4, as per map recorded in Book 21, Page 142 of Maps in the office of the County Recorder of Los Angeles, California

Balance due on principal
Accrued interest 6/18 to 6/16/35 7%

1,36

Note dated June 20, 1932 for \$10,000.00 made by Deane Dewey due June 20, 1938 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated June 20, 1932, recorded in Book 11626, Page 271 of Official Records and covering Lot 21, Block C, Wilshire Blvd. Heights Tract, as per map recorded in Book 6, Page 47 of Maps, in the office of the County Recorder of Los Angeles, California.

Said note is further secured by a Chattel Mortgage covering certain personal property, dated June 2, 1932 and recorded June 23, 1932 in Book 11600, Page 336 of Official Records in the County of Los Angeles, California

Unpaid balance
Accrued interest paid at time of purchase

16,00

2

16,02

Accrued interest on \$16,000. 3/20 to 6/16/35 7%

26

Note dated October 1, 1934 for \$10,000.00 made by Dean Hoover and Anne Hoover due October 1, 1937 with interest at 6% payable quarterly, together with final payment of \$600.00 on October 1, 1935 and October 1, 1936. Said note is secured by a Trust Deed dated October 1, 1934, recorded in Book 17, Page 139 of Official Records and covering Lot 29, Section 17 of Subdivision No. 1 of the property of the Porter Land and Water Company as per map recorded in Book 31, Page 3 et seq. of Miscellaneous Records of Los Angeles County, State of California

Unpaid balance
Accrued interest 4/1 to 6/16/35 @ 6%

10,0
1

Note dated January 26, 1935 for \$3,780.00 made by Cassell M. Hudson and Margaret Louise Hudson due January 26, 1938, with interest at 6% payable quarterly. Said note is secured by a Trust Deed dated January 26, 1935 and recorded June 8, 1935 covering Lots 13 and 14, Block 2, Tract No. 1351 in the City of Santa Monica, County of Los Angeles, State of California as per map recorded in Book 181 Page 116 of Maps in the office of the County Recorder of said County.

Balance due on principal
Accrued interest 4/26 to 6/16/35 @ 6%

3,7

Note dated July 10, 1934 for \$3,000.00 made by Carita Cope Karr due July 10, 1937 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated July 10, 1934, recorded in Book 13231, Page 71 of Official Records and covering the following:

PARCEL 1 Lot 117, Tract No. 2824, City of San Fernando as per map recorded in Book 28, Pages 36 and 37 of Maps in the Office of the County Recorder of Los Angeles, California.

PARCEL 2 Lots 27 and 28, Tract No. 6432, City of Los Angeles as per map recorded in Book 74, Page 63 of Maps in the office of the County Recorder of Los Angeles, California

Unpaid balance
Accrued interest 4/10/ to 6/16/35 @ 7%

2,0

Note dated October 15, 1932 for \$3,000.00 made by Michael Kraus and Frances Kraus due October 15, 1935 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated October 15, 1932, recorded in Book 11837, Page 273 of Official Records and covering the East $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of Section 36, Twp. 2 North Range 13 West S.B.B.M. in the County of Los Angeles, California.

Unpaid balance

Accrued interest 4/15 to 6/16/35 @ 5%

Note dated March 29, 1934 for \$1,000.00 made by Clara M. Little due March 29, 1937 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated March 29, 1934, recorded in Book 12723, Page 17 of Official Records and covering Lot 29 of Lemon Grove Tract as per map recorded in Book 5, Page 144 of maps in the office of the County Recorder of Los Angeles, California.

Unpaid balance

Accrued interest 4/29 to 6/16/35 @ 7%

Note dated September 2, 1934 for \$2,000.00 made by David Weiss and Lena E. Weiss due September 2, 1937 with interest at 7% payable quarterly, together with a \$2,000.00 payment of principal at each interest payment date. Said note is secured by a Trust Deed dated September 2, 1934, recorded in Book 13071, Page 21 of Official Records and covering Lot 31, Block 17 of the Hermosa Beach Tract recorded in Book 1, Pages 23 and 26 of maps in the office of the County Recorder of Los Angeles, California.

Unpaid balance

Accrued interest 1/2 to 6/16/35 @ 7%

Note dated January 1, 1932 for \$1,800.00 made by Linta W. Martin and Lillian M. Martin due January 1, 1935 with interest at 7% payable quarterly commencing April 23, 1932. Said note is secured by a Trust Deed dated January 1, 1932, recorded in Book 11314, Page 24 of Official Records and covering the Nly 40' of Block 24, Tract 10, 3754 as per map recorded in Book 41, Page 69 of maps in the office of the County Recorder of Los Angeles, California.

Unpaid balance

Accrued interest 1/23 to 6/16/35 @ 6%

64-24 Note dated June 1, 1932 for \$1,500.00 due June 1, 1935 with interest at 7% payable quarterly, and note dated June 1, 1932 for \$500.00 with interest at 7% payable monthly plus \$30.00 on principal; both made by Joseph Wendlen and Rebecca Wendlen. Said notes are secured by a Trust Deed dated June 1, 1932, recorded in Book 11588, Page 247 of Official Records and covering Lot 22, Block "A" Strong and Dickinson's Central Park Tract as per map recorded in Book 6, Page 81 of Maps in the office of the County Recorder of the County of Los Angeles, California.

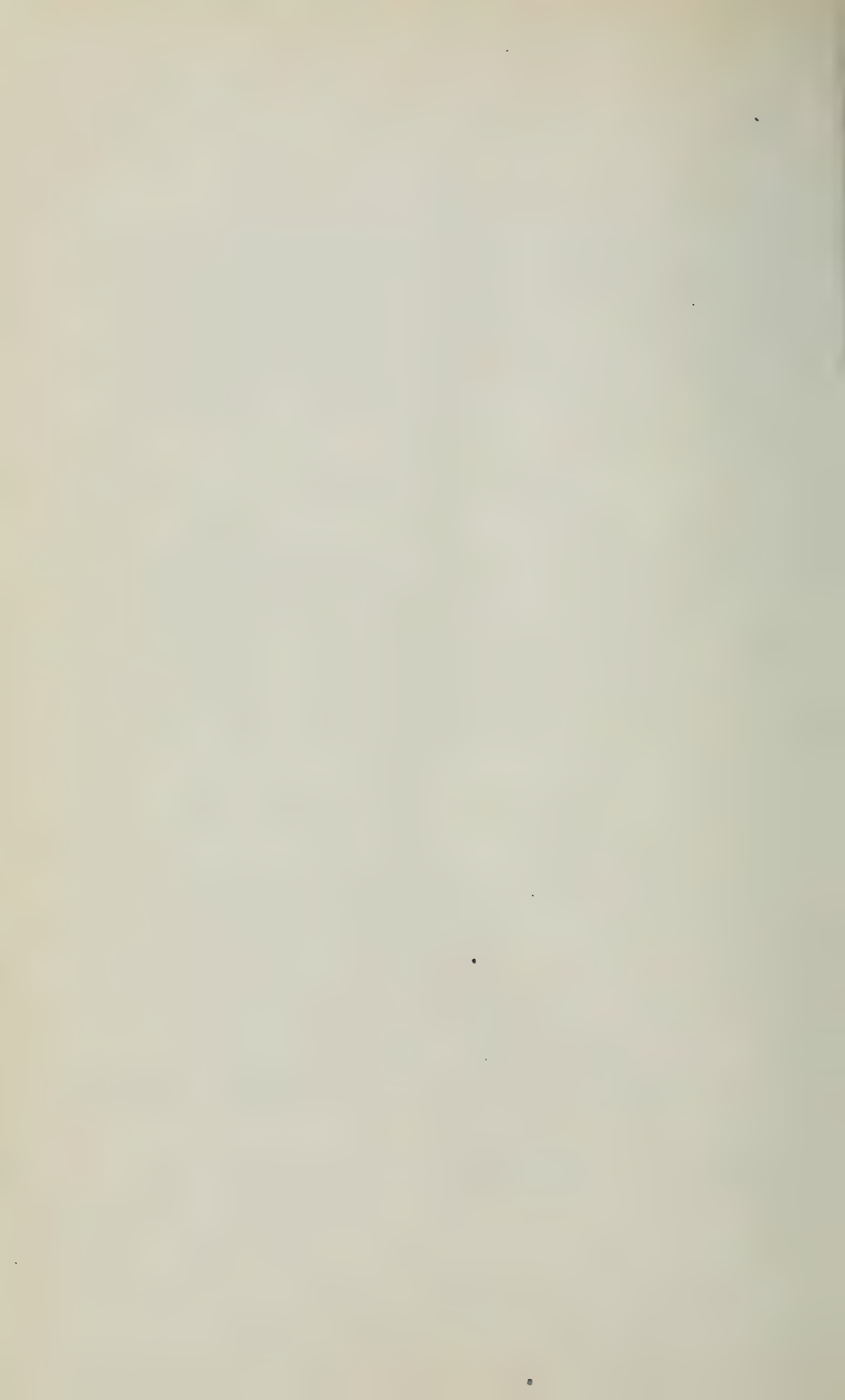
Balance due on principal
Accrued interest 3/15 to 6/16/35 @ 7%

Note dated January 22, 1932 for \$8,000.00 made by Charles A. Page and Marietta A. Page due \$400.00 on or before January 22, 1934 and the balance on or before January 22, 1935 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated January 22, 1932, recorded in Book 11321, Page 327 of Official Records and covering Lot 1 of Tract No. 8072 as per map recorded in Book 98, Pages 14 and 15 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 1/24 to 6/16/35 @ 7%

Note dated February 15, 1935 for \$4,500.00 made by Ella M. Fann with interest at 6% payable quarterly for one year and thereafter principal and interest payable in installments of \$50.00 or more on the 15th day of each month beginning on the 15th day of March 1936 and continuing until January 15, 1938, at which date the entire unpaid balance of principal and interest shall be due and payable. Said note is secured by a Trust Deed dated February 15, 1935, recorded in Book 13309, Page 85 of Official Records and covering Lot 18, Block "B", Wilshire Blvd. Heights Tract as per map recorded in Book 6, Page 47 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 1/1 to 6/16/35 @ 6%



1-27 Note dated May 24, 1933 for \$3,000.00 made by William W. Robinson and Irene B. Robinson with interest at 6% payable quarterly, and principal payable \$500.00 on or before May 24, 1934, and balance of principal and interest due on or before May 24, 1935. Said note is secured by a Trust Deed dated May 23, 1933, recorded in Book 12049, Page 379 of Official Records and covering the Nly 40' of the Sly 50' of Lot 340 of Tract No. 4416 as per map recorded in Book 48, Page 81 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 5/24 to 6/16/35 @ 6%

Note dated August 15, 1932 for \$2,750.00 made by Peter Rudnitsky with interest at 7% per annum, principal and interest payable in installments of \$25.00 or more on the 5th day of each month until paid. Said note is secured by a Trust Deed dated August 15, 1932, recorded in Book 11797, Page 151 of Official Records and covering Lot 2 of Fremont Heights Tract being a subdivision of a portion of Lots 3 and 4 in Block 73 of Hancock's Survey as per map recorded in Book 5, Page 109 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 8/5 to 6/16/35 @ 7%
(less \$9.81 paid on account)

29 Note dated May 15, 1935 for \$5,000.00 made by Kate E. Shivers with interest at 6%, principal and interest payable in installments of \$50.00 or more on the 15th day of each month until April 15, 1938, the entire balance of principal and interest being due on May 15, 1938. Said note is secured by a Trust Deed dated May 15, 1935, recorded in Book 13440, Page 177 of Official Records and covering Lot 13 of Brotherton Place Tract as per map recorded in Book 7, Page 176 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 6/15 to 6/16/35 @ 6%

-3 C Note dated January 15, 1935 for 9,000.00 made by Ben. D. Spencer with interest at 7% principal and interest; payable in installments of \$90.00 or more on the 15th day of each month until December 15, 1937; the entire balance of principal and interest payable on January 15, 1938. Said note is secured by a Trust Deed dated January 15, 1935, recorded in Book 13260, Page 15 of Official Records and covering Lot 4, Block "C" of the Bonnie Brae Tract as per map recorded in Book 9, Page 85 of Miscellaneous Records of the County of Los Angeles, California.

Balance due on principal
Accrued interest 6/15 to 6/16/35 @ 7%

8.81

/ Note dated October 15, 1934 for \$850.00 made by Francis J. Stewart and Frances S. Stewart with interest at 7%; principal and interest payable in installments of \$10.00 or more on the 15th day of each month until October 15, 1937 at which time the entire unpaid balance of principal and interest are payable. Said note is secured by a Trust Deed dated October 15, 1934, recorded in Book 13099, Page 49 of Official Records and covering Lot 27, Newton Tract as per map recorded in Book 9, Page 179 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 8/15 to 6/16/35 @ 7%

81

2- Note dated June 7, 1935 for \$2,113.40 made by John W. Taber with interest at 6%; principal and interest payable in installments of \$30.00 or more on the 7th day of each month until May 7, 1938; the entire balance of principal and interest being payable on June 7, 1938. Said note is secured by a Trust Deed dated June 5, 1935, recorded in Book 13378, Page 385 of Official Records and covering Lot 10, Block "A" of Tract No. 80 as per map recorded in Book 13, Pages 114 and 115 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 6/7 to 6/16/35 @ 6%

2.11

32 Note dated October 1, 1934 for \$4,000.00 made by Frank R. Thomas and Claire V. Thomas due October 1, 1937 with interest at 6% payable monthly. Said note is secured by a Trust Deed dated October 1, 1934, recorded in Book 13120, Page 193 of Official Records and covering Lot 4, Littleton Tract as per map recorded in Book 16, Page 129 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 6/1 to 6/16/35 @ 6%

34 Note dated August 12, 1934 for \$4,000.00 made by Edna Whitten with interest at 7% payable quarterly; principal payable in installments of \$20.00 or more on the 12th day of each month until August 12, 1937 at which date the entire balance of principal and interest are payable. Said note is secured by a Trust Deed dated August 12, 1934, recorded in Book 12890, Page 241 of Official Records and covering Lot 20, Wly 2' Lot 18 in Block 4, Downey Tract as per map recorded in Book 6, Page 427 of Miscellaneous Records of the County of Los Angeles, California.

Balance due on principal
Accrued interest 5/12 to 6/12/35 on \$3,820;
6/12 to 6/16/35 on \$3,800.00 @ 7%

PARTICIPATION CERTIFICATES

35 Part of a note dated August 25, 1934 made by L. L. Truitt and Adele Truitt due May 25, 1937 with interest at 6% payable quarterly. Said note is secured by a Trust Deed dated August 25, 1934, recorded in Book 13014, Page 185 of Official Records and covering Lot 9, Block 59, Town of Glendale as per map recorded in Book 21, Page 96 of Miscellaneous Records of the County of Los Angeles, California.

Balance due on principal
Accrued interest 5/25 to 6/16/35 @ 6%

Part of a note dated April 15, 1935 for \$6,000.00 made by Ernest G. Thomas and Frida M. Thomas due April 15, 1938 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated April 15, 1935, recorded in Book 13396, Page 153 of Official Records and covering a portion of Lot 28 of Watt's Subdivision, part of Rancho San Rafael as per map recorded in Book 5, Page 200 of Miscellaneous Records of the County of Los Angeles, California.

Balance due on principal
Accrued interest 4/15 to 6/16 @ 7%

80

Part of a note dated September 21, 1928 for \$20,000.00 made by John Maltman and Matilda S. Maltman due Sept. 21, 1931 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated September 21, 1928, recorded in Book 8858, Page 43 of Official Records and covering Lots 13 and 14, Block 2, Tract No. 7555 as per map recorded in Book 80, Pages 51, 52 and 53 of Maps in the office of the County Recorder of Los Angeles, California.

Balance due on principal
Accrued interest 3/21 to 6/16/35 @ 7%

3,000
4

Part of a note dated June 15, 1932 for \$15,000.00 made by Roy L. Kent and Elizabeth M. Kent due April 20, 1935 with interest at 7% payable quarterly. Said note is secured by a Trust Deed dated June 15, 1932, recorded in Book 11696, Page 83 of Official Records and covering Lot 8, Block 63 of Campbell and Thompson Tract as per map recorded in Book 9, Page 56 of Maps in the office of the County Recorder of the County of Los Angeles, California.

Balance due on principal
Accrued interest 1/20 to 6/16/35 @ 7%

56
1

STREET IMPROVEMENT BONDS

City of Glendale, Series 3, San Fernando Street, Bond #2 and #3

6

City of Glendale, Series 1, Pacific, Gilbert and Gsell Streets, Bond #15

3

City of Glendale, Series 1, Thompson, Irving, etc. Streets, Bond #4

2 City of Glendale, Series 1, Patterson, Fairmont, etc. Streets, Bond 1-2-5-6-7-9-10-14-17-18-40-46

33

TRUST DEED NOTES
FERRY ESTATE - TRUST No. SS-4358

Value
6/16/35

<u>Description</u>	<u>Balance Due</u>
\$1,425. Trust Deed Note of John Panko, present owner	\$ 135.00
Mary Kotadka, dated 12/10/27, due 12/10/32, extended to 12/10/35, interest at 7%, payable monthly, to 6/10/35.	
\$1,800.00 Trust Deed Note of Samuel & Anna Zimmerman, dated 1/18/28, due 1/18/33, extended to 1/18/36 with interest at 7%, payable monthly. Int. paid to 5/18/35.	314.00
\$2,500.00 Trust Deed Note of Frances L. George & Nettie E. Boltz, dated 1/20/30, due 2/2/33, extended to 2/2/36, with interest at 7%, payable quarterly. Int. to 6/2/35.	2,222.25
\$2,000.00 Trust Deed note of John Soley, Rosa Soley, & Jennie Santilla, present owner Joseph & Mary Agrusa, Sebastian & Josephine DeMaggio, dated 1/28/30, due 2/28/33, extended to 1/28/36, with interest at 7%, payable quarterly. Int. to 4/28/35.	1,025.00
\$2,600.00 Trust Deed note of Lawrence R. & Annabelle M. Taylor, dated 8/5/31, due 6/3/34 with interest at 7%, payable quarterly. Interest to 6/3/35.	2,335.50
\$6,000.00 Trust Deed Note of Amy L. Cogswell, Golda C. & Syril Tipton, dated 1/16/32, due 1/16/33, extended to 1/16/36, with interest at 7%, payable quarterly. Interest paid to 4/16/35.	5,500.00
\$7,500.00 Trust Deed Note of L. A. Weiss & Molly Weiss, dated 4/4/32, due 4/4/35, extended to 4/4/37, with interest at 7%, payable quarterly. Interest paid. to 5/3/35.	7,000.00
\$2,000.00 Trust Deed Note of Arch & Artie Moore, dated 2/22/33, due 11/22/33, extended to 11/22/34 with interest at 7%, payable quarterly. Interest paid to 2/22/35.	2,000.00
\$1,500.00 Trust Deed Note of Anna Kathryn McAllister, dated 7/12/33, due 8/1/36 with interest at 7%, payable monthly. Interest paid to 6/1/35.	1,060.00
\$4,200.00 Trust Deed Note of J. H. & Mary Belle De La Monte, dated 4/30/32, due 1/31/35, extended to 1/31/36 with interest at 7%, payable quarterly; interest paid to 1/31/35.	3,200.00

FERRY ESTATE - TRUST No. SS-4358

Description

Balance Due

Valu
6/15/

\$4,250.00 Trust Deed Note of Mary B. Williams, dated 12/19/34, due 2/11/38, with interest at 7% payable monthly. Interest paid to 6/11/35. \$3,800.00

\$2,700.00 Trust Deed Note of Carver Investment Co., dated 6/20/32, due 6/20/35 with interest at 7%, payable quarterly. Interest paid to 3/20/35. 2,700.00

Participation Certificates issued by Security-First National Bank of Los Angeles, or its predecessor pursuant to Section 104 of the California Bank Act:

Series No.	Maker of Note	Rate	Interest Paid to	Princ. Balance	Val
6800/20	Aiken, F.M., et al	6½%	9/22/34	\$6,400.00	6/
6800/45	Serrano Corporation	6½%	11/21/34	3,000.00	
6800/110	" "	6½%	6/6/35	1,000.00	
			2½%		
6800/125	Arroyo Seco Bldg. Co.	6	5/25/35	500.00	
6800/161	Eddie Schmidt, Inc.	6	6/1/35	3,329.73	
6800/162	Tittmann, Eugene G.	5½	5/27/35	4,029.27	
6800/182	First Christian Church	6½	5/15/35	472.97	
6800/207	Nesa Bernard, Jr.	6½	4/2/35	300.00	
6800/210	McCann, Mary A.	6½	default	1,000.00	
6800/215	Wilshire Lodge Bldg. Corp.	2½	6/25/34	500.00	
6800/314	Chapman Bros. Co.	5	9/1/34	500.00	

Underlying Security foreclosed or Deed taken in lieu of foreclosure:

6800/13	Income Properties Corp.	7	default	500.00
6800/171	Bradbury Estate Co.	6½	"	6,683.91
6800/214	Swensen, Helen Murray	6½	"	1,000.00

TOTAL ASSETS OTHER THAN CASH:

Balance Income	\$ 209.27
Uninvested Principal	<u>1,154.09</u>

The estate of Peter L. Ferry is entitled to 1/2 of the above net income or \$26.16

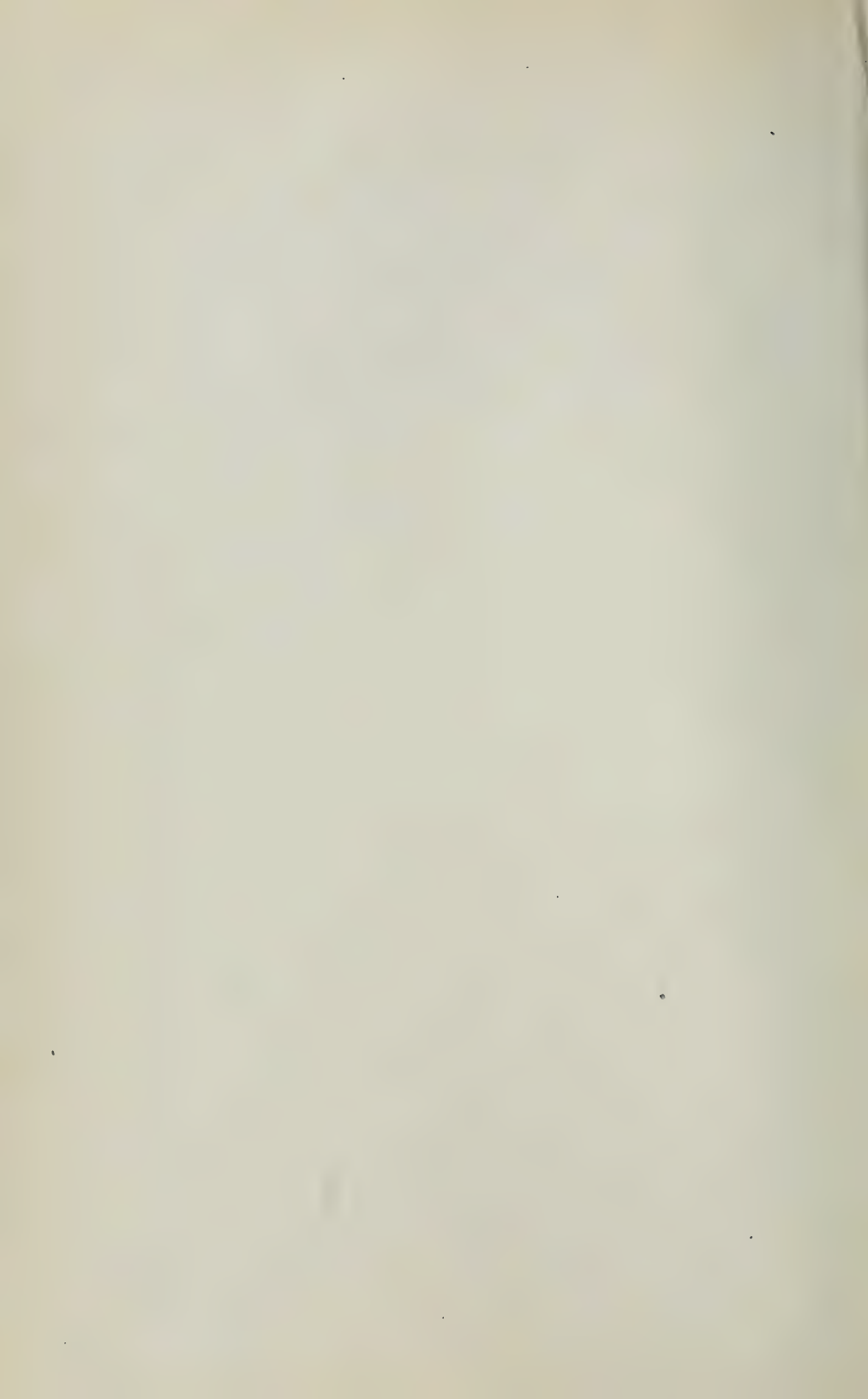
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Total: \$81,918.01 COPY

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES

PRIVATE TRUST NO. 2012

PETER L. and CATHERINE

STATEMENT OF ASSETS OF TRUST

as of June 16, 1935 (Date of Death
of Peter L. Ferry.)

-/ CASH:

Income Cash on Hand	46.09	
Principal Cash on Hand	1,963.07	
Principal Cash in Term Savings Account	<u>4,500.00</u>	26,509.09

SEVEN (7%) PER CENT FIRST MORTGAGES
and/or FIRST TRUST DEEDS

2	Mary G. Anneberg Accrued Interest from 6/10/35	3,017.35 3.52	3,017.35
3	J. E. Betancourt Accrued Interest from 4/1/35	2,200.00 32.09	2,200.00
4	Anna Morrison & Louise Brown Accrued Interest from 6/8/35	7,247.22 11.27	7,247.22
5	Mary I. Chapman Accrued Interest from 6/2/35	1,362.71 3.71	1,362.71
6	Olive O. Darby Accrued Interest from 5/20/35	979.69 4.95	979.69
7	Frederick Jenks Accrued Interest from 5/30/35	1,125.22 3.40	1,125.22
8	Olive A. Leonard Accrued Interest from 5/28/35	17,076.47 59.77	17,076.47
9	Harry G. McBa'n Corp. Accrued Interest from 1/1/32 (\$1,834.58)	7,400.00 \$ 72.40	1,000.00

Raymond D. Morris
Accrued Interest from 5/30/35

3,691.54
11.48

Wm. I. O'Rourke
Accrued Interest from 3/9/35

1,837.27
34.65

Mary E. Shannon
Accrued Interest from 6/4/35

1,167.95
2.72

Ethel B. Schon
Accrued Interest from 3/24/35

5,562.12
88.68

W. P. Valentine
Accrued Interest from 5/12/35

5,637.82
24.05

Frank Wiethoff
Accrued Interest from 3/27/35

5,840.82
89.71

SIX (6%) PER CENT SECOND MORTGAGE

Alpha Jantzen
Accrued Interest from 6/15/35

828.14
.13

SIX (6%) PER CENT SECOND TRUST DEED

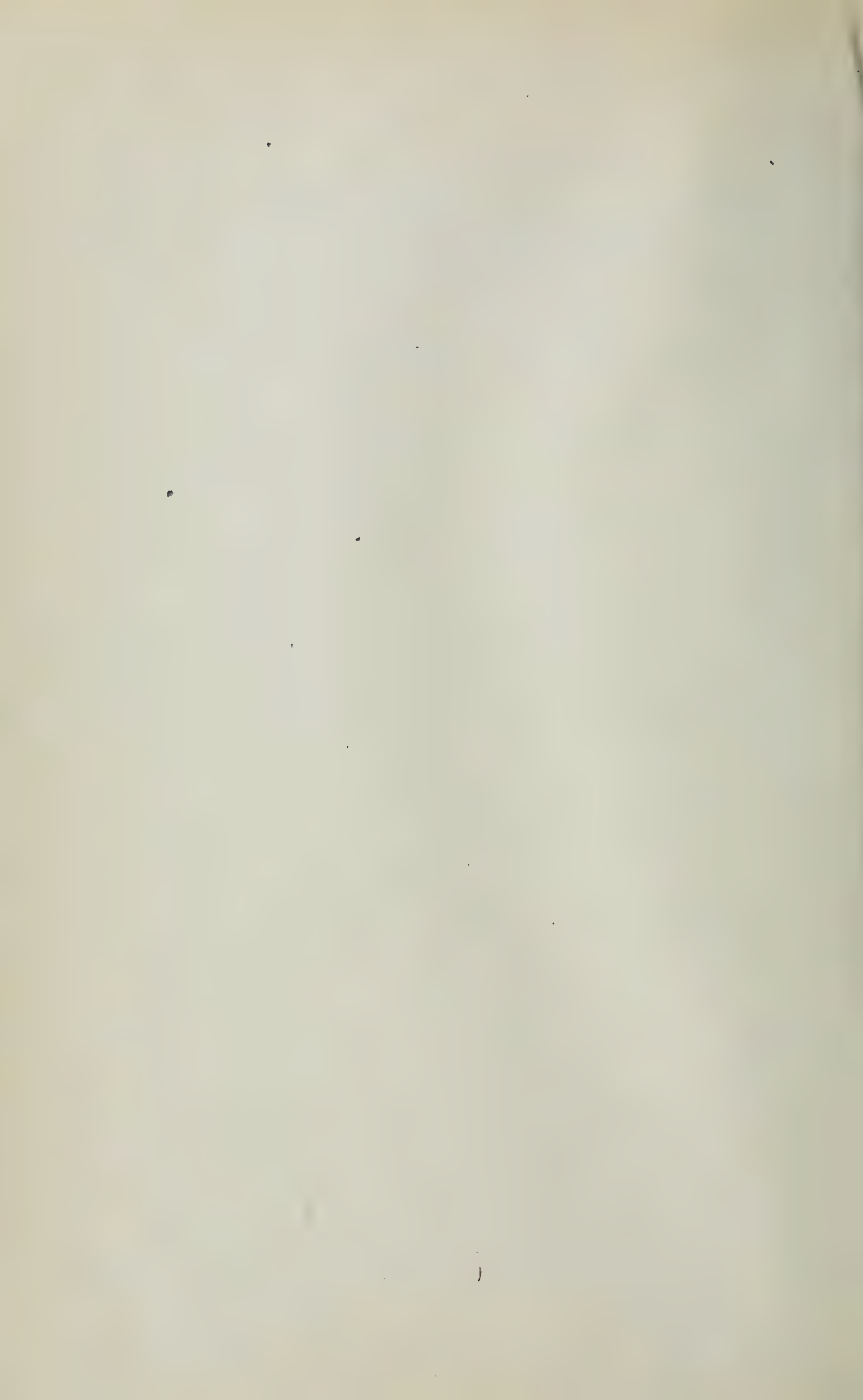
Aurele Vermuelen
Accrued Interest from 2/7/35

485.95
10.43

hundred sixty-seven (167) feet to a point; thence easterly at right angles to said westerly line a distance of one hundred feet to a point; thence southerly parallel with said westerly line to the northerly line of said Chevy Chase Drive; thence westerly along said northerly line to the point of beginning;

TRACT NO.

1. Lots 18 and 19 in Block 4 of Tract 8847, as per map recorded in Book 118, pages 33 to 34 of Maps.
2. Lots 28, 29, 30 in Block 2 of Moore's No-subdivision of a portion of Block 9 of the Glendale Boulevard Tract as per map recorded in Book 9, Page 135 of Maps.
3. Lots 1, 2 and 3 in Block 1 of Northicks Tract as per map recorded in Book 8, Page 154 of Maps.
4. Lots 8, 10, 11, 12 in Tract 7312 as per map recorded in Book 103, pages 25, 26 and 27 of Maps.
5. Lot 13, Block 12, Larr Heights, in the Rancho San Rafael, as per map recorded in Book 52, Pages 34 to 36 of Maps, in the office of the County Recorder of Los Angeles County.
6. Lot 22 of Tract 4644, as per map recorded in Book 52, page 6 and 7 of Maps, in the office of the Recorder of Los Angeles County.
7. Lot 14 in Block "F" of Tract 7600 as per map recorded in Book 92, page 32 of Maps.
8. Lots 1 to 19 inclusive of Tract 6699, as per map recorded in Book 112, Page 77 of Maps.
9. Lots 47 to 53 inclusive of Dayton Avenue Home Tract as per map recorded in Book 7, page 69 of Miscellaneous Records.
10. Lots 40, 52, 53 and 79 of Tract 7726, as per map recorded in Book 84, Page 58 of Maps.
11. Lot 34 of Tract 6025 as per map recorded in Book 64 Page 1 of Maps.
12. Lot 5 in Block 16 of Melves de Verdugo, Sheets 1 to 7 as per map recorded in Book 37, Pages 77 to 83 of Maps.
13. Lots 1 to 4 inclusive and 8 to 16 inclusive, of Tract 872 as per map recorded in Book 113 Page 78 of Maps.
14. Lots 37 and 38 of Tract 9088 as per map recorded in Book 113 Page 65 of Maps.
15. Lots 1, 3 and 4 of Descanso Tract, City of Tujunga, County of Los Angeles, as per map recorded in Book 22, Pages 66 and 67 of Maps.
16. Lots 8 and 9 of the Descanso Tract, City of Tujunga, County of Los Angeles, as per map recorded in Book 22, Pages 66 and 67 of Maps, EXCEPT any portions of Lots 8 and 9 that may be shown on the Los Angeles Avenue



PARCEL NO.

18. Lots 10, 11 and 12 of the Descanso Tract, City of Tujunga, County of Los Angeles, as per map recorded in Book 22, Pages 66 and 67 of Maps, reserving for public road purposes those portions of said Lots 10, 11, and 12 within the bounds of Los Angeles Avenue, as dedicated on map of Glorietta Heights, recorded in Book 30, Page 99 of Miscellaneous Records of said County.
19. Lots 13 and 14, except the South 50 feet, of the Descanso Tract, City of Tujunga, County of Los Angeles, as per map recorded in Book 22, Page 66 of Maps. ALSO EXCEPTING the East 40 feet of Lot 13, to be used for street purposes, and such portion of Lot 14 as may be included within the limits of Glorietta Avenue, as shown on map of Glorietta Heights, recorded in Book 30, Page 99, Miscellaneous Records of said County. ALSO EXCEPTING from said Lots 13 and 14 any portion thereof that may be included within Los Angeles Avenue.
20. The West one-half ($\frac{1}{2}$) of Lot Seventeen (17), the East one-half ($\frac{1}{2}$) of Lot Eighteen (18), and also that portion of Los Angeles Avenue shown on map of Descanso Tract adjoining said West one-half ($\frac{1}{2}$) of Lot Seventeen (17) and East one-half of Lot Eight (18) on the south and lying between the southerly line of said portions of Lots Seventeen (17) and Eighteen (18), and the northerly line of Los Angeles Avenue as dedicated on map of Glorietta Heights, recorded in Book 30, Page 99 of Miscellaneous Records in the office of the Recorder of said County, and the North two hundred eight and fifty hundredths (208.50) feet of the west one-half ($\frac{1}{2}$) of Lot Eighteen (18), and the north two hundred eight and fifty hundredths (208.50) feet of Lots Nineteen (19), Twenty (20), Twenty-one (21), and all of Lots Twenty-two (22) and twenty-three (23), of the said Descanso Tract: RESERVING for public road purposes those portions of Lots Twenty-one (21) and Twenty-two (22) and Twenty-three (23) within the bounds of Glorietta Avenue, as dedicated on map of said Glorietta Heights; the East one-half ($\frac{1}{2}$) of Lot Seventeen (17), of the Descanso Tract: also that portion of Los Angeles Avenue shown on said map of Descanso Tract, adjoining said East one-half ($\frac{1}{2}$) of Lot Seventeen (17) on the South, RESERVING for public road purposes that portion within the bounds of Los Angeles Avenue as dedicated on map of Glorietta Heights, recorded in Book 30, page 99 of Miscellaneous Records in the office of the County Recorder of Los Angeles County.
21. Lot 24 of the Descanso Tract, in the City of Tujunga, County of Los Angeles, as per map recorded in Book 22, Pages 66 and 67 of Maps.
22. Lot 25 of the Descanso Tract, as per map recorded in Book 22, Pages 66 and 67 of Maps, in the office of the Recorder of said County, reserving for public road purposes that portion of Lot 25 within the bounds of Glorietta Avenue, as dedicated on map of Glorietta Heights, recorded in Book 30, Page 99 of Miscellaneous Records, in the office of said County Recorder.
23. Lots 26, 27, 28 and 29 of the Descanso Tract, City of Tujunga,



PARCEL NO.

Lots 26, 27, 28 and 29 as may be included within the line of Glorietta Avenue, as shown on the map of Glorietta Heights, recorded in Book 30, Page 99 of said Miscellaneous Records.

24. Lots 30, 32, 33, 34, 35 and 36 of the Descanso Tract, City of Tujunga, County of Los Angeles, as per map recorded in Book 22, Pages 66 and 67 of said Map Records.
25. Lot 1 and the east 400 feet of Lot 2 of Tract 2055, City of Tujunga, County of Los Angeles, as per map recorded in Book 30, pages 70 and 71 of Map Records.
26. All that portion of Lots Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16) and Seventeen (17) Tract No. 2055, as per map recorded in Book 30, Pages 70 and 71 of Maps, in the office of the Recorder of said County, described as follows: Beginning at the northwesterly corner of said Lot Twelve (12); thence along the north line of said Lot Twelve (12), east nine and seventy-nine hundredths (9 feet) to a point in a line parallel with and two hundred (200) feet, measured at right angles, from the easterly line of Kings Highway (seventy (70) feet wide) as shown on the map of said Tract; thence along said parallel line, south 88 deg. 18' west four hundred thirty-one and twenty-seven hundredths (431.27) feet to a point in the south line of said Lot Seventeen (17); thence west two hundred (200) feet to the southeast corner of said Lot Seventeen (17); thence north 88 deg. 18' east one hundred twenty-six and twenty-nine hundredths (126.29) feet to an angle point in the westerly line of said Lot Seventeen (16); thence north 32 deg. 10' east three hundred sixty and twenty-eight hundredths (360.28) feet to the point of beginning: - Lot Two (2), EXCEPT THE west four hundred (400) feet thereof; and Lots Four (4), Six (6) and Eight (8) of said Tract No. 2055. Subject to easement described in Book 33 hereof.
27. PARCEL 5. That portion of the Northwest quarter of the Northwest quarter of Section 18, Township 2 North, Range 13 East, S.B.W., in City of Tujunga, County of Los Angeles, described as follows: Beginning at a point distant South 235 feet from the Northeast corner of the Northwest quarter of the Southwest quarter of said Section 18; thence South 391 feet; thence East 272 feet; thence Northeasterly 420 feet, more or less to the point of beginning.
28. PARCEL 6. That portion of the fractional Southeast quarter of Section 18, Township 2 North, Range 13 East, S.B.W., in City of Tujunga, County of Los Angeles, bounded and described as follows: Beginning at the Northwest corner of Lot 1 of Tract No. 2055, as per map recorded in Book 30, pages 70 and 71 of said Map Records; thence Southerly along the West line of said Lot 1, a distance of 67 feet to the Easterly prolongation of the North line of the Descanso Tract, as per map recorded in Book 22 Pages 66 and 67 of said Map Records; thence Westerly along said prolongation and North line of the Descanso Tract, 888.58 feet to the Northwest corner of Lot 29 of said Descanso Tract; thence Northerly along the Northerly prolongation of the West line of said Lot 29 to the North line of the Southeast quarter of Section 18; thence Easterly along the last mentioned line to the point of beginning. EXCEPT the

PARCEL NO.

29. Lot 12 of Tract 3659 as per map recorded in Book 38, Page 1 of Maps.
30. Lot 35 in Block "B" of Tract 6463 as per map recorded in Book 81 Page 44 of Maps.
31. Lot 20 in Block 22 of Alamos Heights as per map recorded in Book 5, Page 124 of Maps.
32. Lots 30 and 85 of Tract 7909 as per map recorded in Book 96 Page 31 of Maps.
33. Land situated in the City of Tujunga, County of Los Angeles, State of California, to-wit: That portion of Fractional Section Eighteen (18), Township Two (2) North, Range Thirteen (13) West, S. E. R. & M., described as follows: Beginning at the Northeast corner of Lot One (1) of Tract No. 2055, as per map recorded in Book 30, pages 70 and 71 of Maps, in the office of the Recorder of said County; thence South 0° 18' East two hundred twenty-five (225) feet to the Southeast corner of said Lot One (1); thence along the North lines of Lots Two (2) and Three (3) of said Tract No. 2055 East three hundred and six hundredths (300.06) feet; thence North 24° East two hundred forty-seven and sixty-two hundredths (247.62) feet to a point in the North line of the Southeast quarter of said Fractional Section Eighteen (18); thence along the North line of said Southeast quarter, West four hundred two and twenty-nine hundredths (402.29) feet to the point of beginning. EXHIBIT: An easement, unrecorded by set out in above mentioned decree, for a pipe line, as now exists on the ground together with the right of ingress and egress for the purpose of maintenance and replacement, the location of which is described as beginning at a point approximately 400 feet distant from the West line of Section 17 where the present supply pipe line from the Los Angeles Canyon Reservoir to the Reservoir located upon Lot of Tract No. 2055, as per map recorded in Book 30, pages 70 and 71 of Maps, in the office of the said County Recorder, intersects the North line of Fractional S. E. 1/4 of Section 7, T. 2N. R. 13 E. S. 1 E. M.; thence in a Southwesterly direction along the present constructed pipe line as now laid and marked by a trail out through the corporal to the North line of said Lot 12; crossing Lot 16 of said Tract No. 2055 near the Easterly end thereof at a point about 800 feet West of the West line of Section 17. (Affecting Lots 12 to 16 only) and
34. Portion of the North half of the Southeast quarter of Section 18, Township 2 North, Range 13 West, S. E. M., described as follows: Beginning at the Northeast corner of Lot 1 of Tract 2055; thence South 0° 18' West 225 feet to the Southeast corner of said Lot 1; thence along the North lines of Lots 2 and 3 of said Tract 2055 East 300.06 feet; thence North 24° 41' East 247.62 feet to a point in the North line of the Southeast quarter of said Fractional Section 18; thence along the North line of said Southeast quarter, West 402.29 feet to the point of beginning.
35. Lot 1, being a portion of the Northeast quarter of the Northeast quarter of Section 1, Township 2 North Range 17 West (Rapos

TRUST NO. 6204

PARCEL NO.

Property in County of Fresno, State of California

1. All of Sections 1, 11, 12, 14, and 15, Township 18 South, Range 17 East, Mount Diablo Base and Meridian, County of Fresno, State of California.
2. The Southwest quarter of Section 2, Township 18 South, Range 17 East, and the North half of the Southeast quarter of Section 2, Township 18 South, Range 17 East, Mount Diablo Base and Meridian, County of Fresno.

Property in County of San Bernardino, State of California

1. The North half of the West half of the Southwest quarter of the Southwest quarter of Section 27, Township 1 North, Range 6 West, S. B. B. & M.

Added as per instructions of Mr. Sydney Wetzler, dated March 23, 1936.

West 1/2 of the Southeast 1/4 of Section 36, Township 3 North, Range 17 West, S.B.B. & M., Los Angeles County.

(Defendant's Exhibit F)

[Stamped]: Post Reviewed Sep 18 1940

C-TS:PD

LA:HLD

TECHNICAL STAFF, PACIFIC DIVISION
ACTION MEMORANDUM

In re Report of Hearing 6/19/40, MT:ET:California.
T. S. No. E-65.

Taxpayer:

Estate of Peter Ferry,
Catherine B. Ferry, Executrix,
c/o Claude I. Parker,
808 Bank of America Building,
Los Angeles, California.

Represented by:

J. Everett Blum,
808 Bank of America
Building,
Los Angeles,
California.

Collection District:

6th California.

<u>Date of Death</u>	<u>Kind of Tax</u>	<u>Overassessment Claimed by Taxpayer</u>	<u>Overassessment Found by I. R. Agt. in Chge.</u>
June 16, 1935.	Estate	\$63,825.77	None

[Stamped]: Received Aug 28 1940 Internal Revenue
Agent in Charge Los Angeles Division

Internal Revenue Agent in Charge,
Los Angeles, California:

I return herewith the file relating to the above-described case, accompanied by a statement of the issues, the relevant facts and law, and the conclusion reached, with the grounds therefor. This statement has my approval and is

(Defendant's Exhibit F)

incorporated as a part of the record of the case. The Staff Division has reached the following

Decision:

The overassessment in this case is as follows:

<u>Date of Death</u>	<u>Kind of Tax</u>	<u>Overassessment</u>	<u>Amount of Claim to be rejected</u>
June 16, 1935	Estate	None	\$63,825.77

The claim filed on behalf of the above estate in the amount of \$63,825.77 should be rejected and official notice of such rejection should be issued by registered mail to the taxpayer in accordance with the provisions of section 3772(a) of the Internal Revenue Code.

The taxpayer does not agree to the foregoing determination.

Appropriate action should be taken in accordance with paragraph 5 of Commissioner's Mimeograph, R. A. 1014, T. S. No. 57.

By direction of the Commissioner:

Virgil Burns
Head of Division.

Date: Aug 28 1940

C-TS:PD
LA:HLD

TECHNICAL STAFF, PACIFIC DIVISION
SUPPORTING STATEMENT

In re Report of Hearing 6/19/40, MT:ET:California.
T. S. No. E-65.

(Defendant's Exhibit F)

Taxpayer:

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<u>Date of Death</u>	<u>Kind of Tax</u>	<u>Overassessment Claimed by Taxpayer</u>	<u>Overassessment Found by I. R. Agt. in Chge.</u>
June 16, 1935.	Estate	\$63,825.77	None

Head of Division:

The above-entitled case, referred to the Pacific Division of the Technical Staff, at the request of the taxpayer, has been considered.

In response to a request a conference was granted at Los Angeles, California, on July 8, 1940.

The issues, relevant facts, law and argument and conclusion of the undersigned follow:

I. Issues:

1. Whether an amount of \$32,561.48 representing proceeds of insurance payable to beneficiaries other than the estate in excess of the \$40,000.00 exemption should be included in the gross estate of the decedent.

2. Whether an amount of \$610,837.45 representing property transferred prior to the enactment of section 161(a) of the California Code is includable in the gross estate to the extent of the entire corpus thereof, on the basis of the terms of the respective trust instruments.

(Defendant's Exhibit F)

II. Findings of Fact:

1. Peter Ferry died June 16, 1935, a resident of Glendale, California. Form 706 was filed on behalf of the estate which

Estate of Peter Ferry	Supporting Statement.
reflected a gross estate of \$276,664.17 and disclosed a tax liability amounting to \$16,905.17. As the result of a field investigation a deficiency in estate tax in the amount of \$61,183.19 was determined pursuant to thirty-day letter issued on August 4, 1937.	

A substantial portion of the deficiency was caused by adding to gross estate insurance payable to beneficiaries other than the estate, in excess of the \$40,000.00 exemption as follows:

Returned	\$260,071.24
Tentatively determined	292,632.72
	<hr/>
Increase	\$ 32,561.48

The decedent had taken out various life insurance policies during his lifetime. The policies were the ordinary type of printed forms wherein he retained all of the incidents of ownership, such as the right to change the beneficiary, to the date of his death. The statement was made that the premiums on these various contracts were paid after July 29, 1927 with community funds. No evidence was presented in support of this statement. The examining agent states, report dated February 5, 1940, that he endeavored repeatedly between October 23, 1939, and February 5, 1940, to obtain from the representative of the estate proof that the wife of the decedent contributed any community funds in payment of any part of the in-

(Defendant's Exhibit F)

insurance premiums but that the representative finally advised that he was unable to obtain such proof.

No proof as to such alleged payments was presented during conferences held with the undersigned.

2. A substantial portion of the proposed deficiency was due to increasing the gross estate in the amount of \$610,837.45 for the value of property transferred to various trusts by the decedent between the years 1925 and 1935. These were as follows:

	<u>Trust No.</u>	<u>Date Created</u>	<u>Amount</u>
(a)	S-5869	2-10-25	\$108,363.36
(b)	2012	4- 9-25	82,289.16
(c)	1080	7-10-25	2,547.74
(d)	SS-4358	10- 9-25	95,182.02
(e)	1052	11- 2-25	126,604.80
(f)	6204	6- 5-30	195,850.37
			<hr/>
	Total		\$610,837.45

Estate of Peter Ferry

Supporting Statement.

Copies of the various trust instruments are contained in the file and attention is invited thereto. With the exception of (c) above, each recites that the trustee has received from Peter L. Ferry and Catherine B. Ferry, husband and wife, trustors, a conveyance and transfer to it of the trust property. The pertinent provisions of the trusts are similar and are substantially as follows:

(a) Peter Ferry reserved the right to revoke or terminate Trust S-5869 in whole or in part during his lifetime with the consent of a majority of the living beneficiaries. The income was payable equally to the trustors and their

(Defendant's Exhibit F)

six children, subject to a payment of \$300.00 per month to Catherine Ferry's mother during her lifetime. Upon the death of the survivor of the trustors the principal was to be distributed as prescribed to the remaining beneficiaries.

(b) Trust 2012 provides for the distribution of the income share and share alike, among the trustors and their children, revocation and modification to be effected by the trustors and any three of the remaining beneficiaries. Upon the death of both trustors, the corpus is to be distributed among the children as prescribed thereby.

(c) Trust 1080 was created by Harry G. MacBain, July 10, 1925, to sell certain real estate. On July 10, 1925, decedent purchased a one-tenth interest in the trust and took title thereto as joint tenant with his wife. The record indicates that decedent transferred his interest to three of his children on May 28, 1935, eighteen days prior to his death while in an advanced stage of cancer.

(d) Trust SS-4358 was absolute and irrevocable except that Peter L. Ferry could, during his lifetime, make modifications with the consent of the majority of the other beneficiaries who were his wife and six children. The provision for the disposition of the principal was substantially the same as in the above-described trusts.

(e) In this trust the income was to be paid to the trustors and to the survivor of them during their lives. The trust was to be absolute and irrevocable "except that the Trustors have reserved unto themselves and a majority of the Beneficiaries the right at any time upon written notice delivered to said Trustee, to change the time of payment and/or the proportion of income, and/or the Beneficiaries mentioned in Article Four of this Trust * * *."

(Defendant's Exhibit F)

The provision for the distribution of the principal upon the death of the trustors is substantially the same as in the other trusts.

Estate of Peter Ferry

Supporting Statement.

(f) In this trust the income is payable to trustors jointly during their lifetime and upon the death of either the entire income is payable to the survivor during his or her lifetime. Upon the death of the survivor the corpus is to be distributed equally to the then living children, except that the share of any child under 30 years of age is to be held in trust until such child reaches the age of 30. Trustors reserved the right during their lifetime, acting jointly, to revoke, change, amend or substitute.

After protest the case was considered by the Conference Section of the Bureau and the proposed deficiency was sustained. At the request of the estate's representative the case was reviewed by the Committee on Appeal and Review which sustained the Conference Section. A proposal made by the representative of the estate that it concede the insurance issue and the inclusion of three-fourths of the total trusts in gross estate was rejected by the foregoing action.

Bureau letter MT-ET-7738-6th California, dated February 5, 1938, allowed a credit of \$27,980.46 for State estate, inheritance, legacy and succession taxes. Collector's Form 899 indicates that the full deficiency was paid. Subsequently the estate, on February 20, 1939, filed a claim in the amount of \$63,825.77 and requested reconsideration of both issues. After reconsideration in the field conference office the claim was denied. The recomputation as the result of such conference determined a deficiency of

(Defendant's Exhibit F)

\$848.93. The computation failed to allow a deduction of \$5,950.00, representing a transfer of bank stock and additional expenses of decedent amounting to \$3,310.17 paid by the estate, which were recommended for allowance in Bureau letter MT:ET:C1. 7738-6th California, dated January 22, 1938. These appear to be proper adjustments and should be allowed, eliminating the proposed additional deficiency, which is barred by statute.

III. Law and Argument:

1. This issue presents the question as to whether gross estate should be increased by the proceeds of insurance payable to beneficiaries other than the estate, in excess of the \$40,000.00 exemption.

The estate's representative relies on the cases of *Lang v. Commissioner*, 304 U. S. 264 (20 A. F. T. R. 1251) and *Elizabeth C. McCoy, Adm'x.*, 37 B. T. A. 114. The *Lang* case involved the Revenue Act of 1926. Section 302(g) of that Act, as amended, provides for the

Estate of Peter Ferry

Supporting Statement.

inclusion in the gross estate at the time of decedent's death of the amount receivable, in excess of \$40,000.00, by all other beneficiaries as insurance under policies taken out by the decedent. Article 25, Regulations 70, states that insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application.

Article 25, Regulations 80 (1934 Edition) (as amended by T. D. 4729), provides that insurance is considered to have been taken out by the decedent, whether or not he made the application, if he acquired the ownership of, or any legal incident thereof, in the policy. Legal incidents

(Defendant's Exhibit F)

of ownership in the policy, the article continues, include the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, and the like.

All of the policies in this case were taken out by the decedent upon his own life. They were the usual standard form of policy giving him legal incidents of ownership such as changing the beneficiary, assignment and the like. They thus come within the express wording of Article 25. The estate's representative failed to show that any portion of the premiums was paid by community funds. But even if this were shown it appears immaterial in view of the provisions of Article 25, Regulations 80. Due to the difference in the express wording of Article 25, Regulations 80, as compared with the same article in Regulations 70, the Lang decision is not applicable in this case. The Court, itself, recognized this fact when it stated:

"Treasury Regulations 70 were in force when Lang died and are applicable to his estate. It is unnecessary for us to consider the meaning, validity or effect of the changes introduced by Regulations 80."

In the McCoy case, *supra*, the question was whether the laws of California were the same as those of the State of Washington with respect to life insurance where the premiums had been paid out of community funds. The question of the difference in the regulations was not discussed, as herein presented. The decedent in the McCoy case died in 1932. Hence Regulations 70 would be applicable as in the Lang case. It is apparent that the McCoy case is not controlling herein.

(Defendant's Exhibit F)

It was held in *Newman v. Commissioner*, 76 F (2d) 449, where decedent had taken out policies of insurance wherein he reserved the right to change the beneficiaries, and where the premiums were paid out of community property, and the proceeds were to go

Estate of Peter Ferry

Supporting Statement.

to his wife, that the transaction is regarded as a gift by the husband to the wife, and the estate of neither is regarded as having paid the premiums so as to be entitled to reimbursement on account of the payment.

In the Estate of Cyprian A. Sporn, Sr., 40 B.T.A. 141 (acq.), decedent died in 1936 in Louisiana leaving a large amount of life insurance. He had had the right up to the date of his death to change the beneficiary. All of the premiums on the policies were paid out of community property. It was held that the total value of the insurance policies at date of death in excess of \$40,000.00 was includable in the gross estate.

While both the Sporn and the Newman cases, *supra*, involved community property laws of Louisiana, no material or essential difference between such laws of that State and those of California as to nullify the controlling effect of those decisions in the instant case was asserted or established by the estate's representative. From a study thereof and consideration of cases involving the laws of these states, it does not appear that any material difference therein exists.

2. This issue involves the question as to whether the establishment of certain trusts by the decedent and his wife amounted to a property settlement between the spouses, giving the wife a vested interest therein, which

(Defendant's Exhibit F)

one-half interest should be excluded from the gross estate of the decedent.

The corpus of all five of the trusts was acquired by the decedent during coverture prior to the enactment of section 161(a) of the California Civil Code giving the wife a vested interest in the community. Prior to the enactment of this section of the Code, the wife had a mere expectancy in the community. The rights of the husband were so complete that the husband was the owner of the community. *U. S. v. Robbins*, 269 U. S. 315. The fact that the wife became a co-trustor is therefore without significance or effect. She contributed nothing of her own and her participation was a mere formality.

It is contended that the legal effect of these trusts was to constitute the wife a tenant in common with her husband in the corpus thereof. There is nothing to indicate that the wife acquired any additional property or property rights by becoming a signatory to the trust instruments. Had any of the trusts been revoked, by the terms of the instruments the corpus would have become the property of the trustors, in which event an estate of tenancy in common might have been created. However, none of the trusts was revoked during the decedent's lifetime.

Estate of Peter Ferry

Supporting Statement.

The decedent had also reserved the power, to alter, revoke, or amend the trusts, with the concurrence of certain of the beneficiaries.

Article 20(a), Regulations 80 (1937 Edition) provides that all trusts are subject to tax when the transfer was made after the enactment of the Revenue Act of 1924 and before the amendment of the subdivisions by the Revenue

(Defendant's Exhibit F)

Act of 1934 became effective, and the decedent's death occurred at any time subsequent to the transfer, with power of revocation reserved to the decedent, alone or with others, having or not having a substantial adverse interest in such property.

The wife contributed nothing to the trusts. She had no interest in the trust property other than the life estate given her in certain of the trusts. The decedent reserved the power to alter, amend and revoke the trusts with the consent of others having substantial adverse interests in the property. Accordingly the property, or corpus, of all five trusts are includable in the gross estate of the decedent.

The representative of the estate submitted a proposal for settlement as follows:

(a) That the estate concede issue 1 in full.

(b) That there be included in the gross estate \$503,940.90 of the transfers in trust and that the remainder thereof, or \$106,896.55 be excluded. Acceptance of this proposal would result in an overassessment and refund of \$7,199.84 plus interest. Careful consideration of this offer in the light of the applicable law leads to the conclusion that the proposed offer is unacceptable.

On the basis of the foregoing, the claim for refund of the estate in the amount of \$63,825.77 should be officially rejected in accordance with established procedure.

(Defendant's Exhibit F)

IV. Conclusion:

Since the taxpayer did not submit an acceptable proposal for settlement the case should be returned to the Revenue Agent in Charge for appropriate action.

H. L. Ducker

Assistant Technical Advisor.

8-26-40

GC:C:PEM

368654

Feb 1 1943

In re: Catherine B. Ferry, Executrix, Estate of
Peter Ferry v. Rogan.

DEPUTY COMMISSIONER BLISS,

Miscellaneous Tax Unit.

Attention: Estate Tax Division.

The above-entitled case is now pending in the United States District Court for the Southern District of California and is an action brought by the executrix of the estate of Peter Ferry, deceased, to recover a portion of the Federal estate tax paid by that estate.

An offer in settlement has been submitted by the representatives of this estate under which it is agreed that plaintiffs will accept in full settlement of their claim the sum of \$16,511.39 stated to represent the overpayment re-

(Defendant's Exhibit F)

sulting from decreasing the value of the corpus of Trust No. 6204 from the determined value of \$195,850.37 to \$111,382.87. It is contended by plaintiff that 27 parcels out of 38 parcels of real estate that were put into this trust were held by the decedent and her husband as joint tenants. It appears that the value of these joint tenants parcels at the date of death was \$168,935.00 and it is, therefore, claimed by the estate that the wife's one-half or one-half of that amount or \$84,467.50 should be excluded from this decedent's taxable estate. The exclusion of that amount would reduce the value of the corpus of this trust to \$111,382.87.

It is requested that a recomputation of the estate tax liability of this estate be made after reducing the value of the corpus of this trust by \$84,467.50 and that you advise the amount of the overpayment resulting from this adjustment. Also show in your memorandum the date from which interest is to be computed.

The administrative estate tax file for the estate of Peter Ferry is transmitted herewith and should be returned with your memorandum.

This case is set for trial on February 8, 1943 in Los Angeles and it is necessary that consideration be given to the offer prior to that time. The recomputation requested is for use in this connection. It is, therefore, requested that this matter be given your special attention and that

(Defendant's Exhibit F)

the recomputation be furnished at the earliest possible date.

J. P. Wenchel
J. P. WENCHEL,
Chief Counsel.

Encl. #1133

als

Enclosure No. 919171 With Letter From Hoyt—Mar.
26, 1943 From Department of Justice

[Endorsed]: No. 2106 OC. Ferry vs. Rogan. Deft.
Exhibit No. F in evid. Filed 6/8 1943. By Cross, Deputy
Clerk.

[DEFENDANT'S EXHIBIT G]

* * * * * * * *

TREASURY DEPARTMENT
Washington

[Crest]

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to

MT-ET-GT-1924-1925 Miscellaneous
Donor—Peter Ferry (deceased)

Sep 15 1942

CERTIFICATION

This is to certify that after diligent search, no record is found to exist in the records of this office of a gift tax return, or returns, filed by Peter Ferry, now deceased, reporting a gift, or gifts, to his wife for the calendar years 1924 and 1925.

D. S. Bliss,
D. S. Bliss,
Deputy Commissioner.

[Endorsed]: No. 2106 OC. Ferry vs. Rogan. Exhibit No. G in evid. Filed 6/7 1943. By Cross, Deputy Clerk.

None

FOR NET INCOMES OF MORE THAN \$1,000
ON NET INCOME, REGARDLESS OF AMOUNT, IF DERIVED FROM A PROFESSION OR BUSINESS

For Calendar Year 1924

If Your Income is Computed on a Fiscal Year Basis, or Income is Received from a Partnership or Partnership Computed on a Fiscal Year Basis, Form 10677 Should be Forwarded with the Collector and First Filing of This Form

File This Return with the Collector of Internal Revenue for Your District on or before MARCH 15, 1925
(PRINT NAME AND ADDRESS PLAINLY BELOW)

Peter L. Ferry

614 EAST ACACIA AVE

Glendale

(Print and mail in, or send by mail)

California

RECEIVED
FEB 28 1925

*pac
P.L. Ferry
4/14/25*

OCCUPATION, PROFESSION, OR KIND OF BUSINESS

- Are you a citizen or resident of the United States? *yes*
- If you filed a return for 1923, to what Collector's office was it sent? *San Francisco*
- Is this a joint return of husband and wife? *no*
- Were you married in 1924 with husband or wife living in your household? *yes*
- If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you by blood, marriage, or adoption? *no*
- How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective receiving their chief support from you on the last day of your taxable year? *125*

INCOME

- Salaries, Wages, Commissions, etc. (State address of person from whom received) *38.29*
- Income from Bank Deposits, Savings, etc. *164.00*
- Interest on Bank Deposits, Savings, etc. except interest upon which a tax was paid or interest on Treasury Government Bonds upon which a tax was paid at source *1.89*
- Income from Partnerships, etc. (State name and address of partnership) *1000.00*



1000.00 1927

- Rents and Royalties (State schedule)
- Dividends (State of Bank, Estate, Stock, Bonds, etc.)
- Profits from Sale of Real Estate, Stock, Bonds, etc.
- Profits from Sale of Personal Property, etc.
- Profits from Sale of Real Estate, Stock, Bonds, etc.
- Other

DEDUCTIONS

- Interest Paid
- Taxes Paid (State, Local, Foreign)
- Losses from Sale of Real Estate, Stock, Bonds, etc.
- Losses from Sale of Personal Property, etc.
- Charitable Contributions
- Other

COMPUTATION OF TAX

- Total Income *5000.00*
- Total Deductions *5300.00*
- Net Income *none*
- Normal Tax *5388.48*
- Excess of Normal Tax over Credits *622.00*
- Total Tax *5386.48*
- Refund of Excess of Normal Tax over Credits *470.00*
- Net Tax *4916.48*
- Refund of Excess of Normal Tax over Credits *470.00*
- Net Tax *4446.48*

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if paid

Contractor

Cost of Goods Sold		Other Business Deductions	
1. Labor	2845.78	12. Balance, exclusive of "Labor," reported on Line 8, and compensation for your own services	
2. Material and supplies	584.61	13. Interest on business indebtedness to others	
4. Merchandise bought for sale	86.58	14. Taxes on business and business property	43.7
5. Other costs (Itemize below or on separate sheet)		15. Losses by fire, storm, etc. (explain in table provided therefor at foot of page)	
6. Plus inventory at beginning of year	29,781.40	16. Bad debts arising from sales	
7. Total (Lines 2 to 6, inclusive)	37,762.70	17. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page)	76.7
8. Less inventory at end of year	38,439.47	18. Rent, repairs, and other expenses (itemize below on separate sheet)	
9. Net Cost of Goods Sold (Line 7 minus Line 8)	5,823.27	19. TOTAL (Lines 10 to 18, inclusive)	120.0
	43,924.64	20. TOTAL DEDUCTIONS (Line 9 plus Line 17)	8,391.7
		21. Net Income (Line 1 minus Line 18) (Enter on Item 7)	

Explanation of deductions claimed on Lines 5 and 16: *Ware and Fare on Contractor outfit 208.38439*

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instructions)

1. Kind of Property	2. Amount Received	3. Cost	4. Value at the March 1, 1953	5. Depreciation (explain in table provided therefor at foot of page)	6. Repairs	7. Gross Income (Line 2 minus Line 5)
12 Frame Buildings	8628.25	29,458.11		1472.2		

Explanation of deductions claimed on Line 5:

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instructions)

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Description (explain in table provided therefor at foot of page)	5. Cost	6. Value at the March 1, 1953	7. Net Profit (Line 2 minus Line 5)

State the amount of the sale:

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instructions)

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Description (explain in table provided therefor at foot of page)	5. Cost	6. Value at the March 1, 1953	7. Net Gain or Loss (Line 2 minus Line 5)

State the amount of the sale:

SCHEDULE E—INTEREST ON LIBRARY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions)

1. Description of Security	2. Amount Received	3. Date Received	4. Date Paid	5. Interest (explain in table provided therefor at foot of page)	6. Net Income (Line 2 minus Line 5)

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 15

1. Description of Property	2. Date Acquired	3. Date Lost	4. Description of Loss (explain in table provided therefor at foot of page)	5. Amount of Loss	6. Net Loss (Line 2 minus Line 5)
Frame Buildings					

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Description of Property	2. Date Acquired	3. Date Sold	4. Description of Depreciation (explain in table provided therefor at foot of page)	5. Amount of Depreciation	6. Net Depreciation (Line 2 minus Line 5)
Frame Buildings					

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, AND 15

Obwohl S. A. hatte 100,000 Mark an Kasse 141.5

AFFIDAVIT

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN \$5,000

OR NET INCOME, WHATEVER OF AMOUNT, IF INCURRED FROM A PROFESSION OR BUSINESS, INCLUDING PROFITS

For Calendar Year 1926

File this Return With the Collector of Internal Revenue for Year Ended on or Before March 15, 1927

PRINT NAME AND ADDRESS PLAINLY BELOW

AN Inspector
12/18/27
3030 Cherry Chase Drive
Glen Dale Los Angeles Cal

OCCUPATION, PROFESSION, OR KIND OF BUSINESS

1. Are you a citizen or resident of the United States? *Yes*
2. If you filed a return for 1925, to what Collector's office was it sent? *Los Angeles*
3. Is this a separate return? *No*
4. State name of husband or wife if a separate return was made and the Collector's office where it was filed. *None*
5. Were you married and living with husband or wife on the last day of your taxable year? *Yes*
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? *No*
7. If your status in respect to questions 5 and 6 changed during the year, state date of such change. *No*
8. How many dependent persons, other than husband or wife, under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? *None*

1. Salary, Wages, Commissions, etc. (State name and address of person from whom received. To tax.) Amount received Expense paid (Excludes imputed F.)

FIELD AGENT

2. Income from business or profession (From Schedule A) *4,070.21*
3. Interest on Bonds, Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source) *296.76*
- (a) Interest on Tax-Free Covenant Bonds Upon Which a Tax was Paid at Source *Municipal Bonds 2,236.23*
4. Income from Partnerships, Joint Ventures, etc. (State name and address of partnership, etc.) *604.97*
- Security Trust Savings Bank, 211 N. 5th St., St. Louis, Mo. 5809*
Edith Murphy, Trustee, 30 E. 1st St., St. Louis, Mo.
RAPATL 8 1927 return

5. Rents and Royalties. (From Schedule B)
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)
7. Dividends on Stock of Domestic Corporations
8. Taxable Interest on Liberty Bonds, etc. (From Schedule D)
9. Other Income (including dividends received on stock of foreign corporations. (State nature of source))

POSTING
MAR 15
DATE

TOTAL INCOME IN ITEMS 1 TO 9

10. **DEDUCTIONS**
11. Interest Paid
12. Taxes Paid (Excludes in Schedule D)
13. Losses from Fire, Storm, etc. (Excludes in Schedule D)
14. Bad Debts (Excludes in Schedule D)
15. Contributions (Excludes in Schedule D)
16. Other Deductions Authorized by Law (Excludes in Schedule D)
17. Total Deductions in Items 11 to 16
18. Net Income (Items 10 minus Item 17)

COMPUTATION OF TAX See Instruction 21

19. Earned Net Income not over \$20,000
20. Less Income Exemption and credit for dependents (see Instruction 20)
21. Balance (Item 19 minus 20)
22. Amount taxable at 1% (not over \$20,000) (Item 21)
23. Amount taxable at 2% (not over \$20,000) (Item 21)
24. Amount taxable at 3% (not over \$20,000) (Item 21)
25. Normal Tax 1 1/2% of (Item 22)
26. Normal Tax 4% of (Item 23)
27. Normal Tax 5% of (Item 24)
28. Surtax on Item 19 (see Instruction 21)
29. Total Earned Net Income total (Item 19)
30. No Income (Item 18 above)
31. Less Income (Item 18)
32. Interest on Liberty Bonds, etc. (Item 8)
33. Personal Exemption (Item 8)
34. Credit for Dependents (Item 8)
35. Total of Items 30, 31, and 32
36. Balance (Item 35 minus 36)
37. Amount taxable at 3% (not over the second \$1,000 of Item 35)
38. Balance (Item 37 minus 38)
39. Amount taxable at 3% (not over the second \$1,000 of Item 37)
40. Normal Tax 1 1/2% of (Item 35)
41. Normal Tax 4% of (Item 36)
42. Normal Tax 5% of (Item 37)
43. Surplus (Item 38 minus 42)
44. Total Tax (Item 40 plus 41 plus 42 plus 43)
45. Less Credit for Capital Gains and Losses (see Instruction 21)
46. Total Tax (Item 44 minus 45)
47. Less Credit for Capital Gains and Losses (see Instruction 21)
48. Balance (Item 46 minus 47)
49. Ad. payment for Capital Gains and Losses (see Instruction 21)
50. Total Tax (Item 48 plus 49)
51. Less Income Tax Paid at Source
52. Income and Profit Tax (Item 50 minus 51)

OVERALL BUSINESS DEDUCTIONS	
1. Material and supplies	74124 76
2. Merchandise bought for sale	282653 82
3. Other costs (Itemize below or on separate sheet)	7024 86
4. Free inventory at beginning of year	36264 88
5. TOTAL (Lines 1 to 4, inclusive)	382274 93
6. Less inventory at end of year	29003 91
7. Net Cost or Goods Sold (Line 5 minus Line 6)	293270 92
8. Deduction, exclusive of "Labor," reported on Line 9, and exclusive of compensation for your services	
9. Interest on business indebtedness to others	
10. Taxes on business and business property	
11. Losses by fire, storm, etc. (explain in table provided therefor at foot of page)	
12. Bad debts arising from sales	
13. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page)	7250
14. Rent, repairs, and other expenses (Itemize below or on separate sheet)	
15. TOTAL (Lines 10 to 14, inclusive)	7250
16. TOTAL DEDUCTIONS (Line 7 plus Line 15)	293270
17. Net Profit (Line 1 minus Line 16) (Enter as Item 7)	

Explanation of deductions claimed on Lines 8 and 10: *Wages & Fuel on Production Craft + 25% 12500*

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)						
1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST	4. VALUE AS OF MARCH 1, 1913	5. DEPRECIATION (Depreciation table at foot of page)	6. REPAIRS	7. OTHER IMPROVEMENTS (Itemize below)
14. <i>Home Savings</i>	7839	250	29450		1128	

Explanation of deductions claimed in Column 7:

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)						
1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT RECEIVED	4. DEPRECIATION ALLOWABLE SINCE ACQUISITION	5. COST	6. VALUE AS OF MARCH 1, 1913	7. OTHER IMPROVEMENTS (Itemize below)

State how property was acquired:

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 7)						
1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT RECEIVED	5. DEPRECIATION ALLOWABLE SINCE ACQUISITION	6. COST	7. VALUE AS OF MARCH 1, 1913

State how property was acquired:

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)				
1. OBLIGATION OR SECURITY	2. INTEREST RECEIVED OR ACCRUED	3. AMOUNT OWNED	4. EXPIRATION DATE	5. AMOUNT PAID FOR PURCHASE
(a) Obligations of a State, Territory, or possession, subdivision thereof, or the District of Columbia				
(b) Securities issued under Federal Farm Loan Act, or under such Act as Amended				
(c) Liberty Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of possession of the United States				
(d) Liberty Bonds, Treasury Bonds, Treasury Notes, and 4½% Bonds, Treasury Certificates of Indebtedness, and Treasury War Savings Certificates				\$5,000
(e) Treasury Notes				
(f) Interest to July 2, 1940, on notes exceeding \$50,000 of Liberty Bonds and 4½% Bonds				

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, AND 15

1. <i>Depreciation on Home Savings</i>	
2. <i>Interest on Liberty Bonds</i>	

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B						
1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE WHEN ACQUIRED	4. PRESENT VALUE AFTER ACQUISITION	5. COST	6. VALUE AS OF MARCH 1, 1913	7. DEPRECIATION

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 11						
1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST	4. VALUE AS OF MARCH 1, 1913	5. DEPRECIATION	6. LOSS BY FIRE, STORM, ETC.	7. REPAIRS

AFFIDAVIT

I, *James H. Smith*, being duly sworn, depose and state that the foregoing schedules and statements of net income have been prepared in accordance with the provisions of the Revenue Act of 1926 and the Regulations issued under said Act, and that the same are true and correct to the best of my knowledge and belief.

(If made by agent, the name thereof must be stated on this line.)

Sworn to and subscribed before me this *10th* day of *April*, 1927

2002

... ..

day of the week 1902

Part I

1. Name of business *George H. & Sons*

2. Address *4438 25th St. N.W.*

3. Material and supplies *20295.64*

4. Merchandise bought for sale

5. Other costs (Items below or on separate sheet)

6. Plus inventory at beginning of year *2900.57*

7. TOTAL (Lines 3 to 6, inclusive) *23296.21*

8. Less inventory at end of year *23296.21*

9. Net Cost of Goods Sold (Line 7 minus Line 8) *0*

Part II

10. Schedule, exclusive of "Labor," reported on Line 8, and exclusive of compensation for your services

11. Interest on business indebtedness to others

12. Taxes on business and business property

13. Losses by fire, storm, etc. (explain in table provided therefor at foot of page)

14. Bad debts arising from sales or services

15. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page) *5800*

16. Rent, repairs, and other expenses (Itemized below or on separate sheet)

17. TOTAL (Lines 10 to 16, inclusive) *5800*

18. TOTAL DEDUCTIONS (Line 9 plus Line 17)

19. NET GROSS (Line 1 minus Line 18) (Enter as Item 2) *23296.21*

Note.—Do not deduct here or elsewhere compensation for your services.

Explanation of deductions claimed on Lines 5 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST	4. VALUE AS OF MARCH 1, 1913	5. DEPRECIATION (Depreciate in table at foot of page)	6. REPAIRS	7. OTHER DEDUCTIONS (Itemize below)
<i>Copyright in Capital City</i>	<i>6650.00</i>			<i>1178.00</i>		<i>5420.00</i>

Explanation of deductions claimed in Column 7

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT RECEIVED	4. DEPRECIATION ALLOWABLE (See Instruction 6)	5. COST	6. VALUE AS OF MARCH 1, 1913	7. OTHER DEDUCTIONS (Itemize below)

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 7)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT RECEIVED	5. DEPRECIATION ALLOWABLE (See Instruction 7)	6. COST	7. VALUE AS OF MARCH 1, 1913	8. NET GAIN OR LOSS (See Instruction 7)

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

1. OBLIGATION OR SECURITY	2. INTEREST RECEIVED OR ACCRUED	3. AMOUNT OWNED	4. PRINCIPAL AMOUNT EXEMPT FROM TAXATION	5. AMOUNT IN EXCESS OF EXEMPTION
<i>U.S. Government of a State, Territory, or political subdivision thereof, or the District of Columbia</i>			<i>All</i>	<i>XXXXXX</i>
<i>Securities issued under Federal Farm Loan Act, or under such Act as amended</i>			<i>All</i>	<i>XXXXXX</i>
<i>Liberty Bonds, or bonds or obligations of United States, issued prior to September 1, 1917, and registered in possession of the United States</i>			<i>All</i>	<i>XXXXXX</i>
<i>United States Liberty Bonds, Treasury Notes, 4% and 4 1/2% Bonds, Treasury Certificates of Indebtedness, and Treasury War Savings Certificates</i>			<i>\$5,000</i>	<i>XXXXXX</i>

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

These items are included in the Schedule B and C and are not included in this schedule.

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. DEPRECIATION ALLOWABLE (See Instruction 5)	5. DEPRECIATION CLAIMED	6. DEPRECIATION NOT CLAIMED	7. DEPRECIATION NOT CLAIMED (See Instruction 5)

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 13

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. VALUE AS OF MARCH 1, 1913	5. DEPRECIATION ALLOWABLE (See Instruction 5)	6. DEPRECIATION CLAIMED	7. DEPRECIATION NOT CLAIMED (See Instruction 5)

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$3,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1929

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1930

PRINT NAME AND ADDRESS PLAINLY BELOW

Additional
Penalty
Deductions
Interest
Total
Overpayment
Refund
divided by
Last and
Account No.
Date to which
This statement

Peter L. Ferry

3030 Chevy Chase Drive

Glendale

Los Angeles, Cal

Occupation - Contractor

Living & Working

1. Are you a citizen or resident of the United States?
2. If you filed a return for 1928, in what calendar year did you file it?
3. Is this a joint return of husband and wife?
4. State whether or not you or your wife if a separate return was made, and the calendar year when it was made.

Yes
1928
No
1928

INCOME

1. Salaries, Wages, Commissions, etc.

suppose state?

2. Income from Business or Profession
3. Interest on Bank Deposits, Notes, Certificates, etc.
4. Interest on Tax-Free Government Bonds, U.S. War Bonds, etc.
5. Income from Partnerships
6. Income from Real Estate
7. Income from Insurance
8. Income from Savings, Bonds, etc.
9. Income from Dividends, etc.
10. Income from Annuities, etc.
11. Other Income

DEDUCTIONS

1. Interest on National Debt
2. Interest on State or Local Bonds
3. Interest on Tax-Free Government Bonds, U.S. War Bonds, etc.
4. Interest on Dividends, etc.
5. Interest on Annuities, etc.
6. Interest on Insurance
7. Interest on Savings, Bonds, etc.
8. Interest on Real Estate
9. Interest on Business or Profession
10. Interest on Salaries, Wages, Commissions, etc.

EARNED INCOME CREDIT

1. Earned Income Credit
2. Earned Income Credit
3. Earned Income Credit
4. Earned Income Credit
5. Earned Income Credit
6. Earned Income Credit
7. Earned Income Credit
8. Earned Income Credit
9. Earned Income Credit
10. Earned Income Credit

COMPUTATION OF TAX

1. Total Income
2. Total Deductions
3. Total Tax
4. Total Tax
5. Total Tax
6. Total Tax
7. Total Tax
8. Total Tax
9. Total Tax
10. Total Tax

AFFIDAVIT

Continued July 1935

Schedule A - Gross Income		Schedule B - Deductions	
1. Material and supplies	19086 95	10. Salaries not included as "Labor," in Line 2. (Do not deduct compensation for your services)	
2. Merchandise bought for sale	116 69 73	11. Interest on business indebtedness to others	
3. Other costs (itemize below or on separate sheet)		12. Taxes on business and business property	
4. Plus inventory at beginning of year		13. Losses (explain in table at foot of page)	
5. TOTAL (Lines 2 to 4)	135 56 78	14. Bad debts arising from sales or services	
6. Less inventory at end of year		15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)	5186
7. NET INCOME (Line 5 minus Line 6)	135 56 78	16. Rent, repairs, and other expenses (itemize below or on separate sheet)	
		17. TOTAL (Lines 10 to 16)	5186
		18. TOTAL DEDUCTIONS (Line 9 plus Line 17)	
		19. NET PROFIT (Line 1 minus Line 18) (Enter as Item 2)	

Enter "C" or "M" on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 5 and 16.

SCHEDULE B - INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST OR OTHER BASIS	4. DEPRECIATION	5. NET INCOME
14 Frame Dwellings	3222 50	14700 00	588 00	
Rent 30 acres vacant land	1828 18			

Explanation of deductions claimed in Column 4.

SCHEDULE C - PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT RECEIVED	4. DEPRECIATION	5. NET PROFIT
150+150 Vacant Lot	1912	5700 00		4500 00
Amman Water Co.	1918	4145 77		1700 00

State how property was acquired.

SCHEDULE D - CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT RECEIVED	5. DEPRECIATION	6. NET GAIN OR LOSS
	No Day Year	No Day Year			

State how property was acquired.

SCHEDULE E - INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

1. OBLIGATION OR SECURITY	2. INTEREST RECEIVED	3. AMOUNT PAID	4. NET INCOME
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia			
(b) Securities issued under Federal Farm Loan Act or as Amended, and Certificates of Indebtedness issued after June 17, 1929			
(c) Liberty Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions			
(d) Liberty Bonds and other obligations of United States issued before June 18, 1929, Treasury Bonds and Savings Certificates			
(e) Treasury Notes			

SCHEDULE F - EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

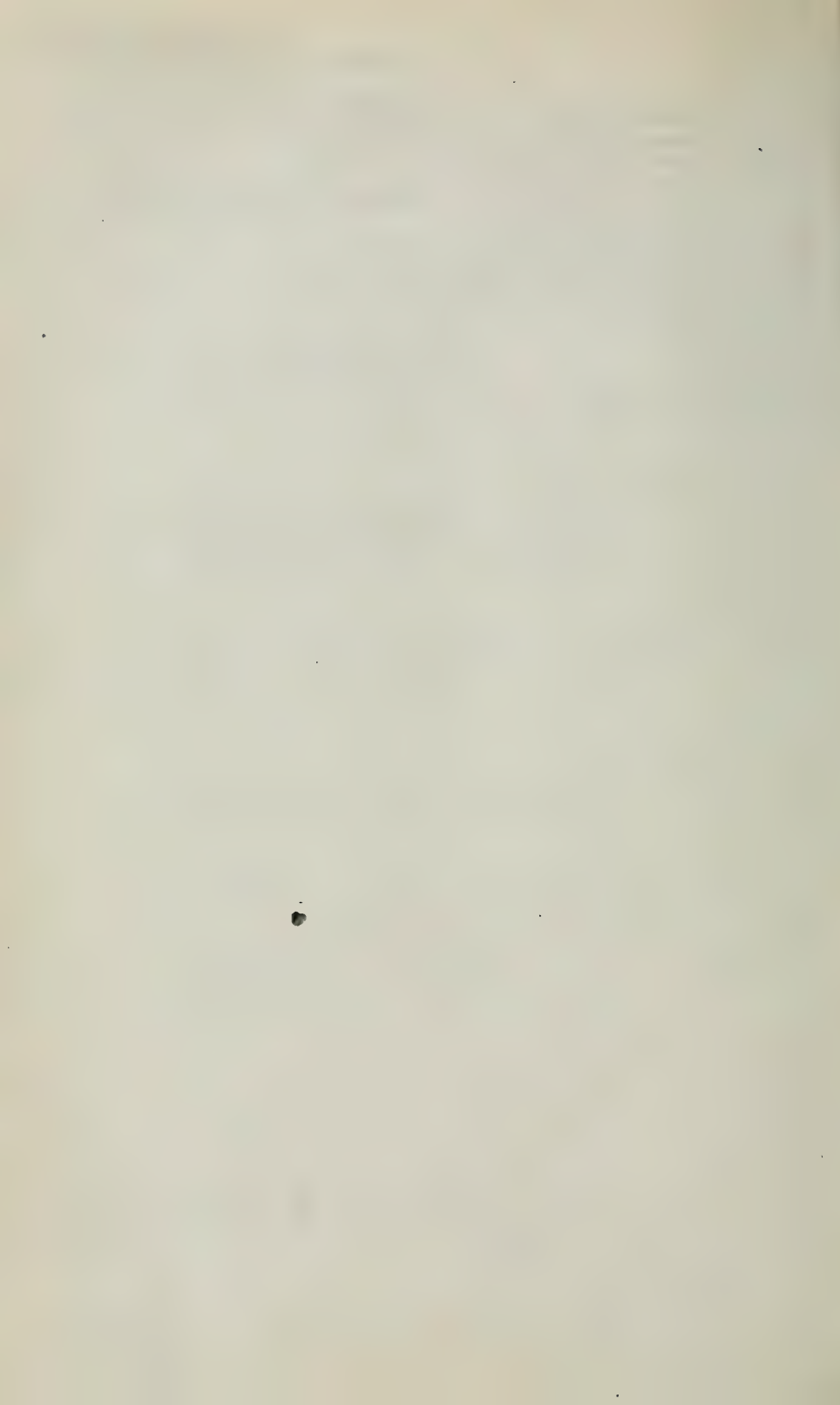
None and full on Continuation of this Return

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST OR OTHER BASIS	4. DEPRECIATION	5. NET INCOME
Frame Construction	1920			

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST OR OTHER BASIS	4. DEPRECIATION	5. NET INCOME



INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1929

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1930

PRINT NAME AND ADDRESS PLAINLY BELOW

Mrs Peter L Ferry
3030 Chevy Chase Drive
Glendale Los Angeles Cal
(Home and number, or rural route) (City) (State)
Occupation *House Wife*

DEFICIENCY
Tax *0*
Additional *0*
Penalty *0*
Deficiency *0*
Interest *0*
Total *0*
Overpayment *0*
Refund *0*
Disallowed *0*
Lost and *0*
Account No. *0*
Date to which *0*
Int. computed *0*

- Are you a citizen or resident of the United States? *yes*
- If you filed a return for 1928, to what Collector's office was it sent? *Los Angeles*
- Is this a joint return of husband and wife? *No*
- State name of husband or wife if separate return was made and the Collector's office where it was sent. *Peter L Ferry*
- Were you married and living with husband or wife on the last day of your taxable year? *yes*
- If not, were you on the last day of your taxable year supported in your household one or more persons closely related to you?
- If your status in respect to questions 5 and 6 changed during the year, state date and nature of change.
- How many dependent persons (other than husband or wife 18 years of age or incapable of self-support were receiving chief support from you on the last day of your taxable year)?

INCOME

- Salaries, Wages, Commissions, etc. (State name and address of employer) Amount received *0* Expenses paid (Explain in Schedule F) *0*
- Income from Business or Profession. (From Schedule A) *Separate 5/9/31*
- Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds) *see P*
- Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source *see P*
- Income from Partnerships. (State name and address) *alt - 8-7 8/20/31*
- Income from Fiduciaries. (State name and address)
- Rents and Royalties. (From Schedule E)
- Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)
- Dividends on Stock of Domestic Corporations
- Taxable Interest on Liberty Bonds, etc. (From Schedule E)
- Other Income (including dividends on stock of foreign corporations). (State nature of income)
(a) *4462 68*
(b) *2945 71*

- TOTAL INCOME IN ITEMS 1 TO 11 *7408 45*
- Interest Paid
- Taxes Paid. (Explain in Schedule F)
- Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)
- Bad Debts. (Explain in Schedule F)
- Contributions. (Explain in Schedule F)
- Other Deductions Authorized by Law. (Explain in Schedule F)
- TOTAL DEDUCTIONS IN ITEMS 12 TO 18
- NET INCOME (Item 12 minus Item 19)

DEDUCTIONS

Ferry No. *21062*
EXHIBIT
No. *4*
Filed *6/7* 19*30*
Clerk. *Carroll*
DEPUTY CLERK.

EARNED INCOME CREDIT

21. Earned Income (not over \$30,000)	\$ 7408 45
22. Less Personal Exemption and Credit for Dependents	300 00
23. Balance (Item 21 minus 22)	\$ 7108 45
24. Amount taxable at 1 1/2% (not over \$4,000)	\$ 400 00
25. Amount taxable at 3% (not over \$4,000)	200 00
26. Amount taxable at 5% (balance over \$8,000 of Item 23)	0 00
27. Normal Tax (1 1/2% of Item 24)	\$ 60 00
28. Normal Tax (3% of Item 25)	60 00
29. Normal Tax (5% of Item 26)	0 00
30. Sortax on Item 21	0 00
31. Tax on Earned Net Income (total of Items 27 to 30)	\$ 120 00
32. Credit of 25% of Tax (not over 25% of Items 30, 44, 45, and 46)	\$ 30 00

COMPUTATION OF TAX (See Instruction 23)

33. Net Income (Item 20 above)	\$ 7408 45
34. Less: Dividends (Item 9)	0 00
35. Interest on Liberty Bonds, etc. (Item 10)	0 00
36. Credit for Dependents	800 00
37. Personal Exemption	0 00
38. Total of Items 34 to 37	\$ 800 00
39. Balance (Item 33 minus 38)	\$ 6608 45
40. Amount taxable at 1 1/2% (not over \$4,000)	400 00
41. Balance (Item 39 minus 40)	\$ 6208 45
42. Amount taxable at 3% (not over \$4,000)	0 00
43. Amount taxable at 5% (Item 41 minus Item 42)	0 00
44. Normal Tax (1 1/2% of Item 40)	60 00
45. Normal Tax (3% of Item 42)	0 00
46. Normal Tax (5% of Item 43)	0 00
47. Sortax on Item 31 see Instruction 23	0 00
48. Tax on Net Income (total of Items 44 to 47)	60 00
49. Tax on Capital Gain or Loss (24% of Capital Gain, 28% of Capital Loss)	0 00
50. Total of or difference between Items 48 and 49	0 00
51. Less Credit of 25% of Tax on Earned Income (Item 32)	30 00
52. Total Tax (Item 50 minus 51)	30 00
53. Less Income Tax Paid at Source	0 00
54. Income Tax paid to a foreign country or U. S. possession	0 00
55. Balance of Tax (Item 52 minus Items 53 and 54)	30 00

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations thereunder.

Notary Public before me this *10th* day of *May*, 1930.
Signature of *Mrs. P. L. Ferry*
Signature of *Notary Public*

INDIVIDUAL INCOME TAX RETURN

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 01-11-2001 BY 60322 UCBAW/SJS

U.S. DEPARTMENT OF AGRICULTURE

1. $\frac{1}{2} \log \frac{1}{2} = -0.5$ bits/sec. (Note: $\log \frac{1}{2} = -1$ bit/sec.)

[illegible]

1910

1901-1902

$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

2. *Amphiprion* *permanens* *permanens*

190194

[Faint handwritten notes]

1911

Explanation of deductions claimed on Lines 5 and 16

Explanation of deductions claimed in Column 6

State how property was acquired

State how property was acquired.

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN IT

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST OR VALUE AS OF MARCH 1, 1913, WHETHER GRANTS	4. SUBSEQUENT IMPROVEMENTS	5. DEPRECIATION ALLOWANCE SINCE ACQUISITION	6. INCREASE IN SALVAGE VALUE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$500
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1930

File This Return With the Collector of Internal Revenue for Year Indicated on or Below

PRINT NAME AND ADDRESS PLAINLY BELOW

Peter L. Ferry

Glendale Cal 3030 Chevy Chase

Glendale

Los Angeles Cal

Occupation *Contractor Rating Machinery*

Do Not Write in These Spaces
908
821441
MAR 13 1931

1. All your income for calendar year 1930, from all sources?
2. If you filed a return for 1929, to what Collector's office was it sent?
3. Is this your return as married man and wife?
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent.

Yes
Los Angeles
Yes
Mr. Peter L. Ferry

5. Were you married and living with husband or wife on the last day of your taxable year?
6. If not, were you on the last day of your taxable year supporting in your household one or more persons closely related to you?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change.
8. How many dependent persons other than husband or wife, under 18 years of age or incapable of self-support were receiving their support from you on the last day of your taxable year?

Exempt from
6th Div. of
Cash, Check, M.O., etc.

Income

INCOME

1. Salaries, Wages, Commissions, etc. (State name and address of employer)

2. Income from Business or Profession (State name and address)
Interest on Bank Deposits, Notes, Corporations Bonds, etc. except interest on tax-free covenant bonds
3. Interest on Tax-free Government Bonds Upon Which Tax was Paid at Source
4. Income from Partnerships (State name and address)

5. Income from Endowments (State name and address)
Glendale Trust Co., Glendale, Cal. Life Insurance Policy
Security Bond Return

6. Income from Real Estate (From Schedule C)
7. Income from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)
8. Income from Dividends, Interest, etc. (From Schedule C)
9. Income from Savings, Pensions, etc. (From Schedule C)

10. Other Income (State name and address of each source of income)

16-718-41
9-5457
FEB 20 1931

18-03477 *

10-378-50

667-70

2-24048

40-39632

23-675

Total Income from all sources

DEDUCTIONS

2400.52

9-087-57

1-565-50

EARNED INCOME CREDIT

COMPUTATION OF TAX (See Instruction 32)

33. Net Income (Item 20 above)	\$ 10938.12	41. Normal Tax (12% of Item 40)	\$ 60
34. Liberty Bond Interest (Item 9)		45. Normal Tax (3% of Item 40)	89
35. Dividend Income (Item 10)		46. Normal Tax (5% of Item 40)	
36. Credit for Dependents (Item 11)		47. Surplus on Item 20 (see Instruction 32)	
37. Personal Exemptions (Item 12)	3500.00	48. Tax on Net Income (Total of Items 41 to 45)	148.00
38. Total of Items 34 to 37	3500.00	49. Tax on Capital Gains or Loss (12% of Col. 8, Schedule D)	
39. Balance (Item 33 minus Item 38)	7438.12	50. Total of or difference between Items 48 and 49	
40. Amount taxable at 15% and over \$4,000	4000.00	51. Less Credit of 25% of Tax (Earned Income Credit)	
41. Balance (Item 39 minus Item 40)	3438.12	52. Total Tax (Item 50 minus Item 51)	
42. Amount taxable at 3% and over \$4,000		53. Less Income Tax Paid at Source (From Schedule C)	
43. Amount taxable at 3% (Item 41 not over \$4,000)		54. Income Tax paid to a foreign country or U.S. possession (From Schedule C)	
		55. Balance of Tax (Item 52 minus Item 53 and 54)	

AFFIDAVIT

I, the undersigned, being duly sworn, depose and say that the accompanying schedules and statements have been examined by me, and to the best of my knowledge and belief they are true and correct, and I declare under oath that the foregoing is a true and correct statement of my income for the taxable year stated, pursuant to the Revenue Act of 1925 and all the amendments thereof.

Peter L. Ferry

Cost of Goods Sold

2. Labor	16242.15	10. Salaries not included as "Labor," in Line 2 (Do not deduct compensation for your services)	
3. Material and supplies	33372.18	11. Interest on business indebtedness to others	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (itemize below or on separate sheet)		13. Leases (explain in table at foot of page)	
6. Plus inventory at beginning of year		14. Bad debts arising from sales or services	
7. Total (Lines 2 to 6)	49714.93	15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)	1457
8. Less inventory at end of year		16. Rent, repairs, and other expenses (itemize below or on separate sheet)	
9. Net Cost of Goods Sold (Line 7 minus Line 8)		17. Total (Lines 10 to 16)	5173
Enter "C," "C or M," on Lines 8 and 9 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		18. TOTAL DEDUCTIONS (Line 9 plus Line 17)	
		19. Net Profit (Line 1 minus Line 18) (Enter as item)	

Explanation of deductions claimed on Lines 5 and 10: *20% Depreciation on Institute of Management*

SCHEDULE B - INCOME FROM RENTS AND ROYALTIES (See Instructions)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. AMOUNT PAID FOR EXPENSES	4. NET INCOME
14 Finance Dealings	2003.00	29400.00	27400.00
302000	3000.00		
Finance Co	1250		

One Half of Sale Rent Reported by the 1st & 2nd

Explanation of deductions claimed in Column 3:

SCHEDULE C - PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instructions)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT RECEIVED	4. AMOUNT PAID FOR EXPENSES	5. NET PROFIT
Finance Motor Co	1928	1709.00		1040.00

State name of property:

SCHEDULE D - CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instructions)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT RECEIVED	5. AMOUNT PAID FOR EXPENSES	6. NET GAIN OR LOSS

State name of property:

SCHEDULE E - INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions)

1. NAME OF ISSUER	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT RECEIVED	5. AMOUNT PAID FOR EXPENSES	6. NET GAIN OR LOSS

State name of property:

SCHEDULE F - EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 19

20% Depreciation on Institute of Management

Also Paid on Income and Investment (Property)

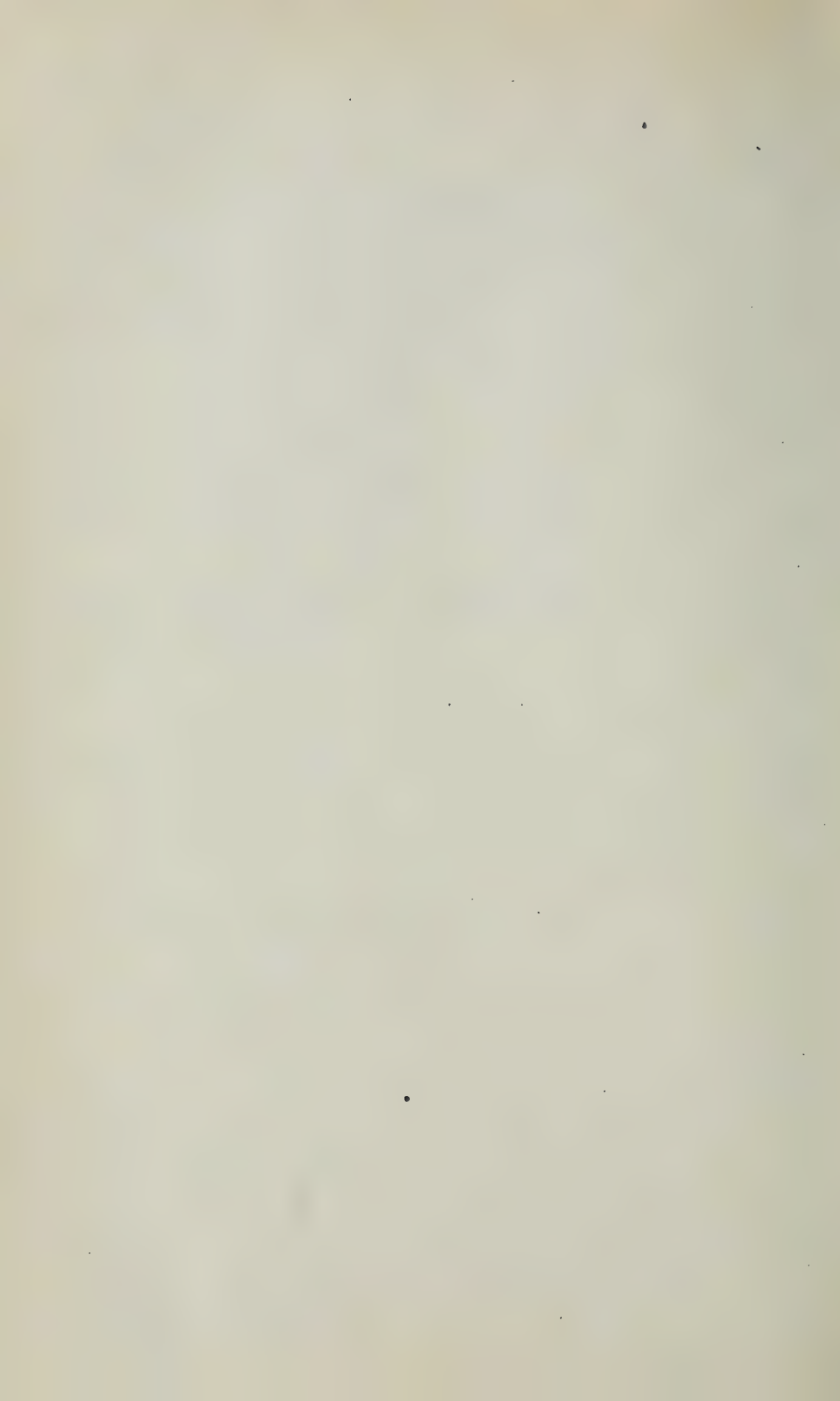
Donations + Church 1/4 Cu - Elk. Solution

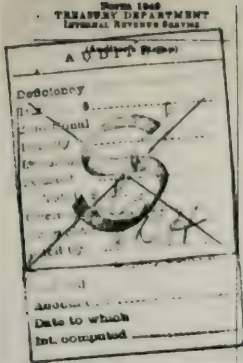
EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT RECEIVED	5. AMOUNT PAID FOR EXPENSES	6. NET GAIN OR LOSS
14 Finance Dealings	1928	Now	25 years	29400.00	1173

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT RECEIVED	5. AMOUNT PAID FOR EXPENSES	6. NET GAIN OR LOSS





INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1930

File This Return With the Collector of Internal Revenue for Your District on or Before Feb 20 1931

PRINT NAME AND ADDRESS PLAINLY BELOW

Mrs Peter L Ferry
(Name)
3030 Chevy Chase
(Street and number, or rural route)
Glendale Los Angeles Cal
(Post office) (County) (State)
Occupation _____

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1929, to what Collector's office was it sent? Los Angeles
3. Is this a joint return of husband and wife? No
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent Los Angeles Cal

5. Were you married and living with husband or wife on the last day of your taxable year?
6. If not, were you on the last day of your taxable year in your household one or more persons (other than yourself) who were dependent on you for support?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change.
8. How many dependent persons other than husband or wife were on the last day of your taxable year?

INCOME

Amount received Expenses paid (Show in Schedule B)

1. Salaries, Wages, Commissions, etc. (State name and address of employer) _____
2. Income from Business or Profession. (From Schedule A) _____
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds) _____
4. Interest on Tax-free Covenant Bonds on Which Tax was Paid at Source _____
5. Income from Partnerships. (State name and address) _____
6. Income from Fiduciaries. (State name and address) _____
7. Rents and Royalties. (From Schedule B) _____
8. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C) _____
9. Taxable Interest on Liberty Bonds, etc. (From Schedule D) _____
10. Dividends on Stock of Domestic Corporations _____
11. Other Income (including dividends on stock of foreign corporations). (State nature of income)
(a) _____
(b) _____
12. TOTAL INCOME IN ITEMS 1 TO 11 10,388.50

DEDUCTIONS

13. Interest Paid. _____
14. Taxes Paid. (Explain in Schedule F) _____
15. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2) _____
16. Bad Debts. (Explain in Schedule F) _____
17. Contributions. (Explain in Schedule F) _____
18. Other Deductions Authorized by Law. (Explain in Schedule F) _____
19. TOTAL DEDUCTIONS IN ITEMS 13 TO 18 _____
20. NET INCOME (From Item 12 minus Item 19) 2,800.00

EARNED INCOME CREDIT

21. Earned Income (from Item 20) over \$30,000	\$	33. Net Income (from Item 20) also	\$	41. Normal Tax (14% of Item 24)	\$
22. Less Personal Exemption and Credit for Dependents	\$	34. Liberty Bond Interest	\$	42. Normal Tax (3% of Item 25)	\$
23. Balance (Item 21 minus 22)	\$	35. Dividend Credits	\$	43. Normal Tax (5% of Item 26)	\$
24. Amount taxable at 14% (not over \$1,000)	\$	36. Credit for Dependents	\$	44. Total Tax (Items 41, 42, 43)	\$
25. Amount taxable at 3% (not over \$4,000)	\$	37. Personal Tax Exemption	\$	45. Less Credit for Federal Income Tax	\$
26. Amount taxable at 5% (balance over \$8,000 of Item 23)	\$	38. Total (Items 34 to 37)	\$	46. Total Tax (Item 44 minus Item 45)	\$
27. Normal Tax (14% of Item 24)	\$	39. Balance (Item 38 minus 28)	\$	47. Less Credit for Federal Income Tax	\$
28. Normal Tax (3% of Item 25)	\$	40. Amount taxable at 3% (not over \$1,000)	\$	48. Total Tax (Item 46 minus Item 47)	\$
29. Normal Tax (5% of Item 26)	\$	41. Balance (Item 39 minus 40)	\$	49. Less Credit for Federal Income Tax	\$
30. Surplus on Item 21	\$	42. Amount taxable at 5% (not over \$4,000)	\$	50. Balance (Item 41 minus Item 49)	\$
31. Tax on Earned Net Income (total of Items 27 to 29)	\$	43. Amount taxable at 5% (Item 41 minus 42)	\$	51. Balance (Item 40 minus Item 50)	\$
32. Credit of 25% of Tax paid over 25% of Items 30, 41, 45, and 46	\$				

AFFIDAVIT

I swear or affirm that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations thereunder.

2722 REV ACT 1928
 AUGUST 1931

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
 AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1931

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1932

PRINT NAME AND ADDRESS PLAINLY BELOW

Peter L Ferry

3030 Chevy Chase

Glendale

Los Angeles

Cal

218134

B. A. G.

File Date 2/11/32

MAID 9-1034

Are you a citizen of the United States?

Yes

If you filed a return for 1930, what Collector's office was it sent to?

No

How many dependents (other than husband or wife) were supported by you during the year, state date and nature of change?

18 years of age or incapable of self-support were received chief support from you on the last day of your taxable year

INCOME

1. Salaries, Wages, Commissions, etc. (State name and address of employer) Amount received Expenses paid (Explain in Schedule F)

2. Income from Business or Profession. (From Schedule A)

3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)

4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source

5. Income from Partnerships. (State name and address)

6. Income from Fiduciaries. (State name and address)

7. Rents and Royalties. (From Schedule D)

8. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)

9. Taxable Interest on Liberty Bonds, etc. (From Schedule F)

10. Dividends on Stock of Domestic Corporations

11. Other Income (including dividends on stock of foreign corporations). (State nature of income)

(a)

(b)

12. TOTAL INCOME IN ITEMS 1 TO 11

DEDUCTIONS

13. Interest Paid

14. Taxes Paid. (Explain in Schedule F)

15. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)

16. Bad Debts. (Explain in Schedule F)

17. Contributions. (Explain in Schedule F)

18. Other Deductions Authorised by Law. (Explain in Schedule F)

19. TOTAL DEDUCTIONS IN ITEMS 13 TO 18

20. NET INCOME (Item 12 minus Item 19)

EARNED INCOME CREDIT

21. Earned Income (not over \$30,000)

22. Less Personal Exemption and Credit for Dependents

23. Balance (Item 21 minus 22)

24. Amount taxable at 1 1/4% (not over \$4,000)

25. Amount taxable at 3% (not over \$4,000)

26. Amount taxable at 5% (balance over \$8,000 of Item 23)

27. Normal Tax (1 1/4% of Item 24)

28. Normal Tax (3% of Item 25)

29. Normal Tax (5% of Item 26)

30. Surtax on Item 21

31. Tax on Earned Net Income (total of Items 27 to 30)

32. Credit of 25% of Tax (not over 25% of Items 30, 44, 45, and 46)

COMPUTATION OF TAX (See Instruction 23)

33. Net Income (Item 20 above) \$ 78 96

34. Liberty Bond Interest (Item 9) \$

35. Dividends (Item 10) \$ 146 85

36. Credit for Dependents (Item 11) \$

37. Personal Exemption (Item 12) \$

38. Total of Items 34 to 37 \$

39. Balance (Item 33 minus 38) \$

40. Amount taxable at 1 1/4% (not over \$4,000) \$

41. Balance (Item 39 minus 40) \$

42. Amount taxable at 3% (not over \$4,000) \$

43. Amount taxable at 5% (Item 41 minus 42) \$

44. Normal Tax (1 1/4% of Item 39) \$

45. Normal Tax (3% of Item 40) \$

46. Normal Tax (5% of Item 41) \$

47. Surtax on Item 20 (see Instruction 23) \$

48. Tax on Net Income (Total of Items 44 to 47) \$

49. Tax on Capital Gain or (12 1/2% of Col. 8, Schedule 48 and 49) \$

50. Total of or difference between Items 48 and 49 \$

51. Less Credit of 25% of Tax (Item 32) \$

52. Total Tax (Item 50 minus 51) \$

53. Less Income Tax Paid at Source \$

54. Income Tax paid to a foreign country or U. S. possession \$

55. Balance of Tax (Item 52 minus Items 53 and 54) \$

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations thereunder.

See instruction 27

Sworn to and subscribed before me this 14 day of Mar 1932.

Peter L Ferry

UNITED STATES AND OTHER INDIVIDUALS

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-01-2001 BY 60322 UCBAW/SJS

1001 m-2 vobolnO 003

1903 1904

1900

2024

16-00000

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1900

1900

Figure 1. Schematic diagram of the experimental setup. The subject is seated in a chair and views the screen through a mirror. The screen displays the target and the starting position of the hand. The hand is moved from the starting position to the target position. The distance between the starting position and the target position is the reach distance. The distance between the target and the starting position is the target distance. The distance between the target and the hand at the end of the movement is the error distance.

DATE _____

1997

10-10-68

1. The first group of authors (e.g., [1, 2]) considers the problem of the control of the motion of a mechanical system with a variable structure. The control is determined by the law of change of the structure of the system. The control is determined by the law of change of the structure of the system.

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1. Total receipts from business or profession (state kind of business)

COST OF GOODS SOLD	
2. Labor	15931 15
3. Material and supplies	36726 80
4. Merchandise bought for sale	
5. Other costs (itemize below or on separate sheet)	
6. Plus inventory at beginning of year	
7. TOTAL (Lines 2 to 6)	52057 95
8. Less inventory at end of year	
9. NET COST OF GOODS SOLD (Line 7 minus Line 8)	52057 95

OTHER BUSINESS DEDUCTIONS

10. Salaries and wages paid to employees (do not deduct compensation for your services)	
11. Interest on business debt	
12. Taxes on business and business property	
13. Lessor's expenses (attach statement of expenses)	
14. Bad debt deduction (attach statement of account)	
15. Depreciation on business property (attach statement of depreciation)	
16. Rent, repairs, and other expenses (attach statement of expenses)	
17. TOTAL (Lines 10 to 16)	52057 95
18. TOTAL DEDUCTIONS (Line 9 plus Line 17)	
19. NET PROFIT (Line 1 minus Line 18) (Total on Form 1040)	

Enter "C," or "C or M," on Line 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 5 and 16.

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instructions)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. DEPRECIATION (Attach statement of depreciation)	4. NET INCOME	5. TAXES	6. OTHER DEDUCTIONS
14 Home Develp Ranch Dream County	7394 25 15000 00	27400 00 1676 00			
1/2 of the amount being to Mrs. Ott & Perry					

Explanation of deductions claimed in Column 6.

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instructions)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT REALIZED	4. DEPRECIATION (Attach statement of depreciation)	5. NET PROFIT	6. TAXES

State how property was acquired.

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instructions)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT REALIZED	5. DEPRECIATION (Attach statement of depreciation)	6. NET GAIN OR LOSS	7. TAXES
	No Day Year	No Day Year				

State how property was acquired.

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions)

1. OBLIGATIONS OR SECURITIES	2. INTEREST RECEIVED OR ACCRUED	3. AMOUNT OWNED	4. TAXES	5. OTHER DEDUCTIONS
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	6349 66			
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended, Treasury Bills, and Treasury Certificates of Indebtedness				
(c) Liberty 3 1/2% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. 1940-41				
(d) Liberty 4% and 4 1/4% Bonds, Treasury Bonds, and Treasury Savings Certificates				
(e) Treasury Notes				

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Church Boy Scout Y.M.C.A. Salvation Army Etc
Ranching house & property when home Residence

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY (If buildings, state material of which constructed)	2. DATE ACQUIRED	3. AGE WHEN ACQUIRED	4. DEPRECIATION LIFE (after acquisition)	5. DEPRECIATION CLAIMED	6. DEPRECIATION ALLOWED
14 Home Develp	1920	new	25 years	27400 00	4%

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEMS 1, 14, 16, 17, AND 18

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE OF LOSS	4. DEPRECIATION LIFE (after acquisition)	5. DEPRECIATION CLAIMED	6. DEPRECIATION ALLOWED

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1931

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1932

PRINT NAME AND ADDRESS PLAINLY BELOW

Mrs Peter L Ferry

3030 Cherry Chase

Glendale
(Post office)

Los Angeles
(County)

Cal
(State)

Occupation Home Wife

1. Are you a citizen or resident of the United States?
2. If you filed a return for 1930, to what Collector's office was it sent?
3. Is this a joint return of husband and wife?
4. State made of husband or wife if a separate return was made and the Collector's office where it was sent.

yes
Los Angeles Cal
no
Peter L Ferry

5. Were you married and living with husband or wife on the last day of your taxable year?
6. If not, were you on the last day of your taxable year in your household one or more persons closely related to you?
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change.
8. How many dependent persons other than husband or wife were supported by you on the last day of your taxable year?

INCOME

1. Salaries, Wages, Commissions, etc. (State name and address of employer)
2. Income from Business or Profession. (From Schedule A)
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source
5. Income from Partnerships. (State name and address)
6. Income from Fiduciaries. (State name and address)
7. Rents and Royalties. (From Schedule B)
8. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)
9. Taxable Interest on Liberty Bonds, etc. (From Schedule D)
10. Dividends on Stock of Domestic Corporations
11. Other Income (including dividends on stock of foreign corporations). (State nature of income)

12. TOTAL INCOME IN ITEMS 1 TO 11

DEDUCTIONS

13. Interest Paid
14. Taxes Paid. (Explain in Schedule F)
15. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)
16. Bad Debts. (Explain in Schedule F)
17. Contributions. (Explain in Schedule F)
18. Other Deductions Authorized by Law. (Explain in Schedule F)
19. TOTAL DEDUCTIONS IN ITEMS 13 TO 18

20. NET INCOME (Item 12 minus Item 19)

EARNED INCOME CREDIT

21. Earned Income (not over \$30,000)
22. Less Personal Exemption and Credit for Dependents
23. Balance (Item 21 minus 22)
24. Amount taxable at 15% (not over \$1,000)
25. Amount taxable at 3% (not over \$1,000)
26. Amount taxable at 5% (balance over \$8,000 of Item 23)
27. Normal Tax (15% of Item 24)
28. Normal Tax (3% of Item 25)
29. Normal Tax (5% of Item 26)
30. Surplus on Item 21
31. Tax on Earned Net Income (total of Items 27 to 30)
32. Credit of 25% of Tax (not over 25% of Items 20, 44, 45, and 46)

33. Net Income (Item 20 above)
34. Liberty Bond Interest (Item 9)
35. Dividends (Item 10)
36. Credit for Dependents
37. Personal Exemption
38. Total of Items 34 to 37
39. Balance (Item 33 minus 38)
40. Amount taxable at 12% (not over \$1,000)
41. Balance (Item 39 minus 40)
42. Amount taxable at 3% (not over \$1,000)
43. Amount taxable at 5% (Item 41 minus 42)

COMPUTATION OF TAX (See Instruction 29)

44. Normal Tax (15% of Item 24)
45. Normal Tax (3% of Item 25)
46. Normal Tax (5% of Item 26)
47. Surplus on Item 21
48. Tax on Liberty Bonds
49. Tax on Capital Gains
50. Total of difference between Items 48 and 49
51. Less credit of 25% of tax on earned income (Item 32)
52. Total Tax (Item 50 minus Item 51)
53. Less Income Tax Paid at Source
54. Income Tax to be paid
55. Balance of Tax Paid (Item 52 minus Item 53)

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me and to the best of my belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Internal Revenue Act of 1921 and the laws amendatory thereof.

See Instruction 27

Sworn to and subscribed before me this 14 day of March, 1932.

Mrs Peter L Ferry

INDIVIDUAL INCOME TAX RETURN

For Calendar Year 1981

OMB No. 1545-0047

Use of this form is required for the filing of individual income tax returns for the calendar year 1981.

See instructions for Form 1040.

Print name and social security number.

Mr. J. D. Smith

123 Main Street

Anytown, N.Y. 12345

Married () Single ()

Head of household ()

Widow ()

Dependent ()

Other ()

1. Gross income

2. Adjusted gross income

3. Taxable income

4. Tax

5. Refund of tax

6. Total refund

7. Total tax

8. Total refund

9. Total tax

10. Total refund

11. Total tax

12. Total refund

13. Total tax

14. Total refund

15. Total tax

16. Total refund

17. Total tax

18. Total refund

19. Total tax

20. Total refund

21. Total tax

22. Total refund

23. Total tax

24. Total refund

25. Total tax

26. Total refund

27. Total tax

28. Total refund

1. Total receipts from business or profession (state kind business)

Cost of Goods Sold

2. Labor
3. Material and supplies
4. Merchandise bought for sale
5. Other costs (itemize below or on separate sheet)
6. Plus inventory at beginning of year
7. TOTAL (Lines 2 to 6)
8. Less inventory at end of year
9. Net Cost of Goods Sold (Line 7 minus Line 8)

Enter "C," "O" or "M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 5 and 10

OTHER BUSINESS DEDUCTIONS

10. Salaries not included as "Labor," in Line 2 (Do not deduct compensation for your services)
11. Interest on business indebtedness to others
12. Taxes on business and business property
13. Losses (explain in table at foot of page)
14. Bad debts arising from sales or services
15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)
16. Rent, repairs, and other expenses (itemize below or on separate sheet)
17. TOTAL (Lines 10 to 16)
18. TOTAL DEDUCTIONS (Line 9 plus Line 17)
19. NET PROFIT (Line 1 minus Line 18) (Enter as Item 2)

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST OR VALUE AS OF MARCH 1, 1913, WHENEVER CREATED	4. DEPRECIATION ALLOWABLE UNDER ACT OF MARCH 3, 1913, (Foot of page)	5. RENTALS	6. OTHER INCOME (Less than Line 2)
Rental on <i>Domestic</i>					

Explanation of deductions claimed in Column 6

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT REALIZED	4. DEPRECIATION ALLOWABLE UNDER ACT OF MARCH 3, 1913, WHENEVER CREATED	5. COST OR VALUE AS OF MARCH 1, 1913, WHENEVER CREATED	6. GAINS OR LOSSES (Less than Line 3)

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 7)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT REALIZED	5. DEPRECIATION ALLOWABLE UNDER ACT OF MARCH 3, 1913, WHENEVER CREATED	6. COST OR VALUE AS OF MARCH 1, 1913, WHENEVER CREATED	7. GAINS OR LOSSES (Less than Line 4)
	Mo. Day Year	Mo. Day Year				

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

1. OBLIGATIONS OR SECURITIES	2. INTEREST RECEIVED OR ACCRUED	3. AMOUNT OWNED	4. FEDERAL AMOUNT EXEMPT FROM TAXATION	5. AMOUNT IN EXCESS OF EXEMPTION
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia			All	XXXXXX
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended, Treasury Bills, and Treasury Certificates of Indebtedness			All	XXXXXX
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions			All	XXXXXX
(d) Liberty 4% and 4½% Bonds, Treasury Bonds, and Treasury Savings Certificates			\$5,000	
(e) Treasury Notes			None	

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

14. *Home Dwelling - Tax Paid*
Char. ymca. - Excess Solider Army

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. KIND OF PROPERTY (If buildings, state material of which constructed)	2. DATE ACQUIRED	3. AGE WHEN ACQUIRED	4. PURCHASE PRICE AFTER ACQUISITION	5. DEPRECIATION ALLOWABLE UNDER ACT OF MARCH 3, 1913, WHENEVER CREATED	6. AMOUNT OF DEDUCTION

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. COST OR VALUE AS OF MARCH 1, 1913, WHENEVER CREATED	4. DEPRECIATION ALLOWABLE UNDER ACT OF MARCH 3, 1913, WHENEVER CREATED	5. LOSS (Less than Line 3)	6. AMOUNT OF DEDUCTION

(Auditor's Stamp)

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

File Code 9

For Calendar Year 1932

File This Return With the Collector of Internal Revenue for Your District on or Before March 1, 1933

PRINT NAME AND ADDRESS PLAINLY BELOW

Peter L Perry

3030 Chevy Chase

Glendale

Los Angeles

(Post office)

(County)



District

MAR 2

Check

Occupation, Business, or Profession

Contractor & Painter

REV 1
SECTION E
BY I. GARRON
DATE SEP 3 1934

- Are you a citizen or resident of the United States? *Yes*
- If you filed a return for 1931, to which Collector's office was it sent? *Los Angeles*
- Is this a joint return of husband and wife? *Yes*
- State name of husband or wife if separate return was made and the Collector's office to which it was sent. *Mr. Peter L Perry Los Angeles*
- Were you married and living with husband or wife on the last day of your taxable year?
- If not, were you on the last day of your taxable year in your household one or more persons closely related to you?
- How many dependent persons (other than husband or wife) were you supporting on the last day of your taxable year? *18 years of age or incapable of self-support received support from you during your taxable year*
- If your status in respect to question 5, 6, or 7 changed during the year, state date and nature of change.

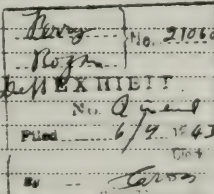
9. State whether your books are kept on cash or accrual basis

INCOME

- Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) Amount received Expenses paid (Explain in Schedule B)
- Income from Business or Profession. (From Schedule A) *23 230 71 R 228 59*
- Interest on Bank Deposits, Notes, Corporation Bonds, etc., (except interest on tax-free covenant bonds)
- Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source
- Income from Partnerships, Syndicates, Pools, etc. (State name and address)
- Income from Fiduciaries. (State name and address) *20 557 04*
- Rents and Royalties. (From Schedule B) *7 995 27*
- Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)
- Taxable Interest on Liberty Bonds, etc. (From Schedule E) *19 495*
- Dividends on: (a) Stock of Domestic Corporations subject to taxation under Title I of 1932 Act (b) Stock of Domestic Corporations not subject to taxation under Title I of 1932 Act (c) Stock of Foreign Corporations
- Other Income. (State nature of income) (a) (b)
- TOTAL INCOME IN ITEMS 1 TO 11 *88 977 85*

DEDUCTIONS

- Interest Paid
- Taxes Paid. (Explain in Schedule F)
- Losses by Fire, Storm, etc. (Explain in Table at foot of page 3)
- Bad Debts. (Explain in Schedule F)
- Contributions. (Explain in Schedule F)
- Other Deductions Not Reported Above. (Explain in Schedule F)
- TOTAL DEDUCTIONS IN ITEMS 13 TO 18
- Net Income (Item 12 minus Item 19)
- Loss: Net loss for 1931 (Subtract Schedule)
- NET INCOME FOR TAX COMPUTATION (Item 20 minus Item 21)



COMPUTATION OF TAX (See Instruction 23)

- Net Income Subject to Tax (Item 22 above)
- Less: Interest on Liberty Bonds, etc. (Item 9)
- Dividends (Item 10 (a))
- Personal Exemption
- Credit for Dependents
- Total of Items 24 to 27
- Balance subject to Normal Tax (Item 28 minus Item 29)
- Amount taxable at 4% (not over \$4,000)
- Amount taxable at 5% (Item 30 minus Item 29)
- Amount of Capital Net Gain or Loss (From Schedule D)
- Normal Tax (4% of Item 30)
- Normal Tax (5% of Item 31)
- Surplus on Item 22 (See Instruction 23)
- Tax on Net Income (total of Items 23 to 31)
- Adjustment for Capital Gain or Loss (12% of Item 32)
- Total Tax (total of or difference between Items 34 and 35)
- Less: Income Tax Paid at Source (Item 36)
- Income Tax Paid to a foreign country or U. S. possession
- Balance of Tax (Item 38 minus Item 39 and 40)

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my belief is a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the Regulations thereunder.

(See Instructions 37)

(If return is made by agent, the reason therefor must be stated on this form)

Peter L Perry

5-11-68

[Faint handwritten notes]

1000 1 040

THE UNIVERSITY OF CHICAGO

[illegible]

3. Explain the importance of the following factors in the development of a country's economy:

A. Ishikawa on *Thalassidroma*. *Journal of Zoology*, Tokyo, 1960, 160: 1-10.

1. The first of these is the fact that the

... ..

... (if necessary) ...

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1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

(3) 2000年12月31日，甲企业“长期股权投资”科目余额为1000万元。

(c) *Explain the importance of the following:*

[4] - 100

27. 1901. 1902. 1903. 1904. 1905. 1906. 1907. 1908. 1909. 1910. 1911. 1912. 1913. 1914. 1915. 1916. 1917. 1918. 1919. 1920. 1921. 1922. 1923. 1924. 1925. 1926. 1927. 1928. 1929. 1930. 1931. 1932. 1933. 1934. 1935. 1936. 1937. 1938. 1939. 1940. 1941. 1942. 1943. 1944. 1945. 1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582

44-38861-1035

..... 1.2807 2042578 8

27. $\log_{10} 1000 = 3$ $529 \cdot 152.57 \cdot 4$

2. What is the purpose of the study? To determine the effect of the use of the

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CONFIDENTIAL

1. $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

2. Total Production of 1941-42

10. The following is a list of the names of the persons who have been appointed to the various positions in the organization of the American Society of International Law:

From (10) and (11) we have

1. The first part of the document is a list of names and their corresponding dates. The names are: "John Doe", "Jane Smith", "Bob Johnson", "Alice Brown", "Charlie White", "David Green", "Eve Black", "Frank Gray", "Grace Hall", "Henry King", "Ivy Lee", "Jack Miller", "Karen Wilson", "Leo Young", "Mia Fox", "Noah Reed", "Olivia Scott", "Peter Turner", "Quinn Evans", "Samuel Adams", "Tina Baker", "Uma Carter", "Victor Davis", "Wendy Evans", "Xavier Foster", "Yara Gibson", "Zoe Harris". The dates are: "1990", "1991", "1992", "1993", "1994", "1995", "1996", "1997", "1998", "1999", "2000", "2001", "2002", "2003", "2004", "2005", "2006", "2007", "2008", "2009", "2010", "2011", "2012", "2013", "2014", "2015", "2016", "2017", "2018", "2019", "2020", "2021", "2022", "2023", "2024", "2025", "2026", "2027", "2028", "2029", "2030", "2031", "2032", "2033", "2034", "2035", "2036", "2037", "2038", "2039", "2040", "2041", "2042", "2043", "2044", "2045", "2046", "2047", "2048", "2049", "2050", "2051", "2052", "2053", "2054", "2055", "2056", "2057", "2058", "2059", "2060", "2061", "2062", "2063", "2064", "2065", "2066", "2067", "2068", "2069", "2070", "2071", "2072", "2073", "2074", "2075", "2076", "2077", "2078", "2079", "2080", "2081", "2082", "2083", "2084", "2085", "2086", "2087", "2088", "2089", "2090", "2091", "2092", "2093", "2094", "2095", "2096", "2097", "2098", "2099", "2100", "2101", "2102", "2103", "2104", "2105", "2106", "2107", "2108", "2109", "2110", "2111", "2112", 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DATE 30 2007 15 14 50

...and the fact that the ...

..... 2000) 2000

$$x_1, x_2, \dots, x_n \in \mathbb{R}^n \quad (2)$$

2017/01/11

$$12 \frac{1}{2} \text{ m} \times 10 \frac{1}{2} \text{ m} = 131 \frac{1}{2} \text{ m}^2$$

THE END OF THE LINE

W. Johnston and J. W. Johnston

1871-1872

Table 1. *Continued*

[Faint handwritten text at the bottom of the page]

1774-1775

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

... ..
... ..

1. Total receipts from business or profession state and of business

COST OF GOODS SOLD

OTHER BUSINESS DEDUCTIONS

2 Labor 15649 40
 3 Material and supplies 28299 90
 4 Merchandise bought for sale
 5 Other costs itemize below or on separate sheet
 6 Plus inventory at beginning of year
 7 TOTAL Lines 2 to 6
 8 Less inventory at end of year
 9 Net Cost of Goods Sold Line 7 minus Line 8 43949 90

10 Salaries of employees (Include salaries of owner and partner if not deducted on separate sheet for business)
 11 Interest on business debts (Include interest on notes, mortgages, etc.)
 12 Taxes on business and on business property
 13 Losses (Include losses on fire, theft, etc.)
 14 Bad debts arising from sale of goods or services
 15 Depreciation on business property (Include depreciation on buildings, machinery, etc.)
 16 Rent, royalties, and other expenses (Include expenses on separate sheet)
 17 TOTAL (Lines 10 to 16)
 18 TOTAL DEDUCTIONS Line 9 plus Line 17
 19 NET PROFIT Line 9 minus Line 18

Enter "C" or "M" on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 5 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES

| 1. KIND OF PROPERTY | 2. AMOUNT RECEIVED | 3. COST OR VALUE OF MARKS OR PATENTS, WHEREVER APPLICABLE | 4. DEPRECIATION (Include depreciation on buildings, machinery, etc.) | 5. LOSS | 6. GROSS INCOME |
|------------------------------------|---------------------|---|--|---------|----------------------------------|
| 14 Farm Buildings
Ranch Dream C | 5598 39
15000 00 | 29000 00 | 1176 00 | 3421 84 | |
| | | | | | 1/2 Rental By Mr. B. L. L. L. L. |

Explanation of deductions claimed in Column 6

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC.

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. AMOUNT REALIZED | 4. COST | 5. MARKET VALUE AT DATE OF ACQUISITION (If sold before March 1, 1917, use cost) | 6. COST OF IMPROVEMENTS (Include cost of improvements made after March 1, 1917) | 7. GROSS PROFIT |
|---------------------|------------------|--------------------|---------|---|---|-----------------|
| | | \$ | \$ | \$ | \$ | \$ |

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. DATE SOLD | 4. AMOUNT REALIZED | 5. COST | 6. MARKET VALUE AT DATE OF ACQUISITION (If sold before March 1, 1917, use cost) | 7. GROSS PROFIT |
|---------------------|------------------|--------------|--------------------|---------|---|-----------------|
| | | | \$ | \$ | \$ | \$ |

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES

| 1. OBLIGATION OR SECURITY | 2. AMOUNT OWNED | 3. INTEREST RECEIVED | 4. EXCESS AMOUNT PAID FOR PREMIUM | 5. AMOUNT RECEIVED |
|--|-----------------|----------------------|-----------------------------------|--------------------|
| (a) Obligations of a State, Territory, or political subdivision thereof or of the District of Columbia | | | All | XXXX |
| (b) Securities issued under Federal Farm Loan Act or under similar Act as amended, Treasury Bonds, and Treasury Certificates of Indebtedness | | | All | XXXX |
| (c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions | | | All | XXXX |
| (d) Liberty 4% and 4½% Bonds and Treasury Bonds | | | 27,000 | XXXX |
| (e) Treasury Notes | | | All | XXXX |

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Ernest & Charles
 14 Farm Buildings
 Taxes on Business Property

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

| 1. KIND OF PROPERTY (If buildings, state whether or not constructed) | 2. DATE ACQUIRED | 3. DATE WHEN ACQUIRED | 4. DEPRECIATION (If sold before March 1, 1917, use cost) | 5. COST | 6. MARKET VALUE AT DATE OF ACQUISITION (If sold before March 1, 1917, use cost) | 7. GROSS PROFIT |
|--|------------------|-----------------------|--|---------|---|-----------------|
| Rent for 14 Farm Buildings 1920 | | Mar | 25000 00 | | | 49 |

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. DATE WHEN ACQUIRED | 4. DEPRECIATION (If sold before March 1, 1917, use cost) | 5. COST | 6. MARKET VALUE AT DATE OF ACQUISITION (If sold before March 1, 1917, use cost) | 7. GROSS PROFIT |
|---------------------|------------------|-----------------------|--|---------|---|-----------------|
| | | | \$ | \$ | \$ | \$ |

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1932

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1933

SEP 13 1932
TUN E
SEP 13 1932

NAME AND ADDRESS PLAINLY BELOW

Mrs Peter L Ferry

3030 Chevy Chase

Glendale
(Post office)

Los Angeles
(County)

Cal
(State)

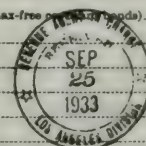
Occupation, Business, or Profession *House Wife*

- Are you a citizen or resident of the United States? *Yes*
- If you filed a return for 1931, to which Collector's office was it sent? *Los Angeles*
- Is this a joint return of husband and wife? *Yes*
- State name of husband or wife if a separate return was made and the Collector's office to which it was sent *Peter L Ferry*
- Were you married and living with husband or wife on the last day of your taxable year? *Yes*
- If not, were you on the last day of your taxable year in your household one or more persons closely related to you?
- How many dependent persons (other than husband or wife) 18 years of age or less capable of self-support received support from you during your taxable year?
- If your status in respect to question 5, 6, or 7 changed during the year, state date and nature of change.
- State whether your books are kept on cash or accrual basis.

ATTACH REMITTANCE HERE

INCOME

- Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) Amount received Expresses paid (Explain in Schedule F)
- Income from Business or Profession. (From Schedule A)
- Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free bonds)
- Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source.
- Income from Partnerships, Syndicates, Pools, etc. (State name and address)
- Income from Fiduciaries. (State name and address)
- Rents and Royalties. (From Schedule B)
- Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)
- Taxable Interest on Liberty Bonds, etc. (From Schedule E)
- Dividends on: (a) Stock of Domestic Corporations subject to taxation under Title I of 1932 Act (b) Stock of Domestic Corporations not subject to taxation under Title I of 1932 Act (c) Stock of Foreign Corporations
- Other Income. (State nature of income) (a) (b)
- TOTAL INCOME IN ITEMS 1 TO 11



DEDUCTIONS

- Interest Paid
- Taxes Paid. (Explain in Schedule F)
- Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)
- Bad Debts. (Explain in Schedule F)
- Contributions. (Explain in Schedule F)
- Other Deductions Not Reported Above. (Explain in Schedule F)
- TOTAL DEDUCTIONS IN ITEMS 13 TO 18
- NET INCOME (Item 12 minus Item 19)
- Less: Net loss for 1931 (Submit Schedule)
- NET INCOME FOR TAX COMPUTATION (Item 20 minus Item 21)

Ferry
Exhibit
No. 2106
EXHIBIT
No. R
6/4/32
6/4/32

COMPUTATION OF TAX (See Instruction 22)

- Net Income Subject to Tax (Item 22 above) \$ *5618.63*
- Less: Interest on Liberty Bonds, etc. (Item 9)
- Dividends (Item 10 (a)) *2500*
- Personal Exemption *2400*
- Credits for Dependents *4900*
- Total of Items 24 to 27 *7186.3*
- Balance subject to Normal Tax (Item 23 minus 27)
- Amount taxable at 4% (not over \$4,000)
- Amount taxable at 8% (Item 28 minus 30)
- Amount of Capital Net Gain or Loss (From Schedule 1)
- Normal Tax (6% of Item 28)
- Normal Tax (9% of Item 31)
- Surtax on Item 22 (See Instruction 30)
- Tax on Net Income (Total of Items 32 to 35)
- Adjustment for Capital Gain or Loss (18 2/3% of Item 36)
- Total Tax (total of or difference between Items 36 and 37)
- Less: Income Tax Paid at Source 6% of Item 4)
- Income Tax Paid to a foreign country or U. S. possession
- Balance of Tax (Item 38 minus 39 and 40)

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my belief is a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the Regulations thereunder.

NOTES FROM BUSINESS OR PROFESSION (Page 1)

| | | | |
|--|----|--|----|
| 1. Total receipts from business or profession (state kind of business)..... | | OTHER BUSINESS DEDUCTIONS | |
| Cost of Goods Sold | | | |
| 2. Labor | \$ | 10. Salaries not included as "Labor" in Line 2 (Do not deduct compensation for your services)..... | \$ |
| 3. Material and supplies | | 11. Interest on business indebtedness to others | |
| 4. Merchandise bought for sale | | 12. Taxes on business and business property | |
| 5. Other costs (itemize below or on separate sheet)..... | | 13. Losses (explain in table at foot of page) | |
| 6. Plus inventory at beginning of year..... | | 14. Bad debts arising from sales or services | |
| 7. TOTAL (Lines 2 to 6)..... | \$ | 15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)..... | |
| 8. Less inventory at end of year..... | | 16. Rent, repairs, and other expenses (itemize below or on separate sheet)..... | |
| 9. NET COST OF GOODS SOLD (Line 7 minus Line 8)..... | \$ | 17. TOTAL (Lines 10 to 16)..... | \$ |
| Enter "C," "C or M," or "M" on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower | | 18. TOTAL DEDUCTIONS (Line 9 plus Line 17)..... | |
| | | 19. NET PROFIT (Line 1 minus Line 18) (Enter as Item 2) | |

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

| 1. KIND OF PROPERTY | 2. AMOUNT RECEIVED | 3. COST OR VALUE AS OF MARCH 1, 1913, WHEN FIRST ISSUED | 4. DEPRECIATION (Paid in table at foot of page) | 5. REPAIRS | 6. OTHER EXPENSES (Include below) |
|-----------------------------|------------------------|---|---|------------|-----------------------------------|
| 4 Frame Dwelling | \$ 6598 39
15000 00 | \$ 29400 00 | \$ 1176 00 | \$ 3471 54 | \$ 1000 00 |
| 1/4 Agreed By City & County | | | | | 3 |

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. AMOUNT REALIZED | 4. COST | 5. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE | 6. COST OF IMPROVEMENTS INCURRED TO ACQUISITION OF MARCH 1, 1913 | 7. DEPRECIATION ALLOWED OR ALLOWABLE SINCE ACQUISITION OF MARCH 1, 1913 |
|---------------------|------------------|--------------------|---------|--|--|---|
| | | \$ | \$ | \$ | \$ | \$ |
| | | | | | | |
| | | | | | | |

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See instructions)[illegible]

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions)

| 1. OBLIGATIONS OR SECURITIES | 2. AMOUNT OWNED | 3. INTEREST RECEIVED OR ACCRUED | 4. PRINCIPAL AMOUNT EXEMPT FROM TAXATION | 5. AMOUNT OWNED IN FAVOR OF TREASURY |
|--|-----------------|---------------------------------|--|--------------------------------------|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia | \$ | \$ | All | XXXXXX |
| (b) Securities issued under Federal Farm Loan Act, or under such Act as amended, Treasury Bills, and Treasury Certificates of Indebtedness | | | All | XXXXXX |
| (c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions | | | All | XXXXXX |
| (d) Liberty 4% and 4½% Bonds and Treasury Bonds | | | \$5,000 | \$ |
| (e) Treasury Notes | | | All | XXXXXX |

SCHEDULE F-EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

SCHEDULE F - EXPLANATION OF DEDUCTION
Enoch & Charles
Pages on Buam... Property

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

| 1. KIND OF PROPERTY
(If buildings, state material of which constructed.) | 2. DATE
Acquired | 3. AGE WHEN
Acquired | 4. PURPOSE
For What
Acquisition | 5. COST
(Excludes of Land) | 6. VALUE 2. 1913
Val. 2. 1913
Payable in Three Years
Excludes of Land | 7. DEPRECIATION
Annual or Semi-Annual
And - - - - - PERCENT |
|---|---------------------|-------------------------|---------------------------------------|-------------------------------|--|---|
| 17. <i>From Lumber Co.</i> | 1910 | <i>New</i> | 25% | \$ 29.00 | \$ | \$ 42 |

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITS

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. COST OR VALUE
AS OF MARCH 1, 1913
MUNICIPALITY OR STATE | 4. SUBSEQUENT
IMPROVEMENTS | 5. DEPRECIATION
ALLOWANCE UNDER
ACT OF 1913 | 6. INCOME AND
CAPITAL GAINS |
|---------------------|------------------|--|-------------------------------|---|--------------------------------|
| | | \$ | \$ | \$ | \$ |

[illegible]

1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the past for a variety of reasons. Some are interested in the past because they want to know what happened and why it happened. Others are interested in the past because they want to understand the people who lived in the past and how they thought and felt. Still others are interested in the past because they want to learn from the mistakes of the past and avoid them in the future.

10:00

[Faint handwritten notes at the bottom of the page]

• • • • •

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

... ..

... ..

1. The first group of variables includes the demographic characteristics of the respondents, such as age, gender, and education level. These variables are used to control for potential confounding factors that may influence the dependent variable.

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$. It is shown that the solutions of the system (1) are bounded and tend to zero as $t \rightarrow \infty$ if the matrix A is stable and the matrix B is positive definite. The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$ if the matrix A is not stable. It is shown that the solutions of the system (1) are bounded and tend to zero as $t \rightarrow \infty$ if the matrix A is not stable and the matrix B is positive definite.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

.....

1. *Journal of the American Statistical Association*, 87(419), 1102-1110.

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

1. *Phragmites australis* (Cav.) Trin. ex Steud. (Common reed)

1. $H^2(X, \mathbb{R}) \cong \mathbb{R}^2$ and $H^2(X, \mathbb{Z}) \cong \mathbb{Z}^2$. The intersection form is given by the matrix $\begin{pmatrix} 0 & 1 \\ 1 & 0 \end{pmatrix}$.

[illegible]

1. The first group of people who are likely to be affected by the proposed project are the local residents who live in the vicinity of the project site. These residents may be affected by the project in a number of ways, including increased traffic, noise, and air pollution. It is important to identify these potential impacts and develop measures to mitigate them.

INDIVIDUAL INCOME TAX RETURN

Do Not Write

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1933

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1934

PRINT NAME AND ADDRESS PLAINLY BELOW

Peter L Ferry
3030 Chevy Chase
Glendale *Los Angeles CAI*

- Are you a resident of the United States? *Yes*
- If you are a resident of the United States, in which State, Territory, or Possession were you domiciled in 1933? *Los Angeles*
- Is this a joint return? *No*
- State whether you are a single person, married person, or a partner in a partnership. If you are a partner, state the name of the partnership and your share of the profits or losses. *Married*
- If you were married, state the name of your spouse. *Mrs P L Ferry*
- If you were married, state the date of your marriage. *1928*
- If you were married, state the date of your divorce. *None*
- If you were married, state the date of your remarriage. *None*
- If you were married, state the date of your death. *None*
- If you were married, state the date of your remarriage. *None*

INCOME

- Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) *\$ 5*
- Income (or Loss) from Business or Profession. (From Schedule A) *16 073 06*
- Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds) *45 43*
- Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source
- Income (or Loss) from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business) *6 817 55*
- Income from Fiduciaries. (State name and address)
- Rents and Royalties. (From Schedule B) *3 265 81*
- (a) Profit from Sale of Stocks and Bonds held two years or less. (From Schedule C)
- (b) Profit or Loss from Sale of Other Assets held two years or less. (From Schedule C)
- (c) Profit or Loss from Sale of Capital Assets (if not reported as Item 30). (From Schedule C)
- Taxable Interest on Liberty Bonds, etc. (From Schedule D)
- Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1932 Act
- (b) Domestic Corporations not subject to taxation under Title I of 1932 Act
- (c) Foreign Corporations
- Other Income. (State nature) (Use separate schedule, if necessary)

12. TOTAL INCOME IN ITEMS 1 TO 11. *20 488 79*

DEDUCTIONS

- Interest Paid
- Taxes Paid. (Explain in Schedule E)
- Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)
- Bad Debts. (Explain in Schedule F)
- Contributions. (Explain in Schedule F)
- Other Deductions Authorized by Law. (Explain in Schedule E)
- TOTAL DEDUCTIONS IN ITEMS 13 TO 18. *2 89 42*
- NET INCOME (Item 12 minus Item 19) *20 488 79*

Exhibit
No. 210672
FILED
6/9/1942
CLERK

COMPUTATION OF TAX (See Instruction 23)

- Net Income Subject to Tax (Item 12) *\$ 20 26 40*
- Less: Interest on Liberty Bonds, etc. (Item 9) *\$ 0*
- Dividends (Item 10) *2000 00*
- Personal Exemption *2000 00*
- Credit for Dependents *2000 00*
- Total of Items 22 to 25 *\$ 4500 00*
- Balance subject to Normal Tax (Item 21 minus Item 26) *\$ 15 76 40*
- Amount taxable at 4% (not over \$4,000) *\$ 0*
- Amount taxable at 8% (Item 27 minus Item 28) *\$ 0*
- Amount of Capital Net Gain or Loss of a reported as Item 30 (c) (From Schedule C)
- Normal Tax (Item 27) *\$ 2 39 13*
- Normal Tax on Item 28
- Surplus on Item 20 (see instruction 23)
- Tax on Net Income (Item 27) *\$ 2 39 13*
- Adjustment for Capital Gain or Loss (see instruction 23)
- Total Tax (see instruction 23) *\$ 2 39 13*
- Less: Income Tax Paid at Source (see instruction 23)
- Income Tax Paid to a Foreign Country or U.S. Possession
- Balance of Tax (Item 29 minus Item 31)

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been prepared by me, and to the best of my belief is a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the National Act and the Regulations issued thereunder.

(See Instruction 27)

(If return is made by agent, the return therefor must be signed by the agent)

Sworn to and subscribed before me this *14* day of *March*, 1934.

Peter L Ferry

ATTACH REMITTANCE HERE

NOT INV.

INDIVIDUAL INCOME TAX RETURN

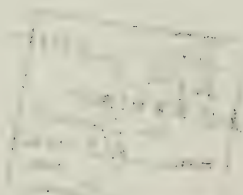
For the calendar year 1957

For Calendar Year 1957

1040



DEPARTMENT OF THE TREASURY



1040

1040

1040

1040

1040

1040

1040

1040

1040

1040

1040

1040

1. Total receipts from business or profession (state kind of business): *Consulting Real Estate General*

Cost of Goods Sold

2. Labor *\$ 10.42 1/2*

3. Material and supplies

4. Merchandise bought for sale

5. Other costs (itemize below or on separate sheet)

6. Plus inventory at beginning of year

7. TOTAL (Lines 2 to 6) *479.14 81*

8. Less inventory at end of year *479.3 80*

9. NET COST OF GOODS SOLD (Line 7 minus Line 8) *\$ 370.57 01*

10. Salaries not included as "Labor" in Line 2 but deduct compensation for your services

11. Interest on business indebtedness to others

12. Taxes on business and business property

13. Losses (explain in table at foot of page)

14. Bad debts arising from sales or services

15. Depreciation, depletion, and depletion tax (explain in table provided at foot of page)

16. Rent, repairs, and other expenses (itemize below or on separate sheet)

17. TOTAL (Lines 10 to 16) *\$ 375.37 3*

18. TOTAL DEDUCTIONS (Line 9 plus Line 17) *375.37 3*

19. NET PROFIT (or LOSS) (Line 1 minus Line 18) (Enter as item)

Enter "C", or "C or M", on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower

Explanation of deductions claimed on Lines 5 and 16: *20% Depreciation on Rental Property 1/2 Commission on Sales & Leases*

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

| 1. KIND OF PROPERTY | 2. AMOUNT RECEIVED | 3. COST OR VALUE AT MARCH 1, 1913, WHEREIN: (a) WATER | 4. IMPROVEMENTS (Excludes depletion; book of value) | 5. REPAIRS | 6. OTHER EXPENSES (Excludes depletion) |
|-------------------------------------|--------------------|---|---|------------------|--|
| <i>14 Frame Dwelling & Road</i> | <i>\$ 4249.67</i> | <i>\$ 2940.00</i> | <i>\$ 588.00</i> | <i>\$ 375.80</i> | |

Explanation of deductions claimed in Column 6

SCHEDULE C—PROFIT OR LOSS FROM SALE OF STOCKS, BONDS, REAL ESTATE, ETC. (See Instruction 10)

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. DATE SOLD | 4. AMOUNT RECEIVED | 5. COST | 6. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE | 7. COST OF IMPROVEMENTS SUBSEQUENT TO ACQUISITION OR MARCH 1, 1913 | 8. DIFFERENTIAL ALLOWANCE (See Instructions 11 and 12) |
|---|------------------|--------------|--------------------|---------|--|--|--|
| (a) STOCKS AND BONDS* HELD TWO YEARS OR LESS: | Mo. Day Year | Mo. Day Year | | | | | |
| Total (a) (Transfer net profit to Item 8 (a)) | XXXXX | XXXXX | \$ | \$ | \$ | | XXXXXX |
| (b) OTHER ASSETS HELD TWO YEARS OR LESS: | | | \$ | \$ | \$ | \$ | \$ |
| Total (b) (Transfer net profit or loss to Item 8 (b)) | XXXXXX | XXXXXX | \$ | \$ | \$ | \$ | \$ |
| (c) CAPITAL ASSETS: | | | \$ | \$ | \$ | \$ | \$ |
| Total (c) (Transfer net gain or loss to Item 8 (c) or 30) | XXXXXX | XXXXXX | \$ | \$ | \$ | \$ | \$ |

* As defined in Section 23 (t), 1932 Act.
State how property was acquired.

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 13)

| 1. OBLIGATION OR SECURITY | 2. AMOUNT OWNED | 3. INTEREST RECEIVED OR ACCRUED | 4. PRINCIPAL AMOUNT PAID FROM TAXATION | 5. AMOUNT OWNED IN FISCAL YEAR |
|---|-----------------|---------------------------------|--|--------------------------------|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia | \$ | \$ | All | XXXXXX |
| (b) Securities issued under Federal Farm Loan Act, or under such Act as amended, and obligations of United States possessions | | | All | XXXXXX |
| (c) Liberty 3 1/2% Bonds and other obligations of United States issued on or before September 1, 1917 | | | All | XXXXXX |
| (d) Liberty 4% and 4 1/4% Bonds and Treasury Bonds | | | \$5,000 | \$ |
| (e) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness | | | All | XXXXXX |

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Rental Income from Rental Property

Depreciation on Rental Property

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

| 1. KIND OF PROPERTY (If buildings, state material in which constructed) | 2. DATE ACQUIRED | 3. AGE WHEN ACQUIRED | 4. ESTIMABLE LIFE AFTER ACQUISITION | 5. COST (Excludes cost of land) | 6. DEPRECIATION (Excludes cost of land) | 7. DEPRECIATION ALLOWANCE IN FISCAL YEAR |
|---|------------------|----------------------|-------------------------------------|---------------------------------|---|--|
| <i>14 Frame Dwelling</i> | <i>1920</i> | <i>New</i> | <i>25 yrs</i> | <i>\$ 2940.00</i> | <i>\$ 490.00</i> | <i>20%</i> |
| <i>Depreciation on Rental Property</i> | <i>1933</i> | | <i>6 yrs</i> | <i>\$ 488.80</i> | | |

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN IT

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. MARCH 1, 1913, VALUE IF ACQUIRED PRIOR TO THAT DATE | 4. LOSS BY FIRE, STORM, ETC. | 5. LOSS BY FIRE, STORM, ETC. | 6. LOSS BY FIRE, STORM, ETC. |
|---------------------|------------------|--|------------------------------|------------------------------|------------------------------|
| | | | \$ | \$ | \$ |

(Auditor's Stamp)

CLOSED

No Additional Tax

Amount Paid

And for

6/14/35

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000

AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1933

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1934

PRINT NAME AND ADDRESS PLAINLY BELOW

Mrs Peter L Ferry

3030 Chevy Chase

Glendale

(Street and number, or rural route)

Los Angeles

CAL

(Post office)

File Code

Serial Number

District

Cash

File

- Are you a citizen or resident of the United States? *Yes*
- If you filed a return for 1932, which Collector's office was it in? *LA*
- Is this a joint return of husband and wife? *No*
- State name of husband or wife and the separate return was made and the Collector's office to which it was sent. *Peter L Ferry, LA*
- Were you married and living with husband or wife during your taxable year? *Yes*

- If you were paid during your taxable year something in your household or for their services (other than help to you)? *No*
- Have many dependent persons (other than husband or wife) under 18 years of age or incapable of self support received their chief support from you during your taxable year? *No*
- If your status in respect to marital status or changed during the year, state date and nature of change. *No change*
- State whether your books are kept on cash or accrual basis. *Cash*

UNEMPLOYMENT COMPENSATION OR OTHER BENEFITS: If you received any such benefits, state the amount and the name of the person or organization from which you received them. If you received any such benefits, state the amount and the name of the person or organization from which you received them.

NAME AND ADDRESS OF TAXPAYER: *Peter L Ferry*

INCOME

A salary received

Expenses paid

1. Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) \$

2. Income (or Loss) from Business or Profession. (From Schedule A) \$

3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds) \$

4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source \$

5. Income (or Loss) from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business) \$

6. Income from Fiduciaries. (State name and address) \$

7. Rents and Royalties. (From Schedule B) \$

8. (a) Profit from Sale of Stocks and Bonds held two years or less. (From Schedule C) \$

(b) Profit or Loss from Sale of Other Assets held two years or less. (From Schedule C) \$

(c) Profit or Loss from Sale of Capital Assets (if not reported as Item 30). (From Schedule C) \$

9. Taxable Interest on Liberty Bonds, etc. (From Schedule D) \$

10. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1932 Act. \$

(b) Domestic Corporations not subject to taxation under Title I of 1932 Act. \$

(c) Foreign Corporations \$

11. Other Income. (State nature) (Use separate schedule, if necessary) \$

12. TOTAL INCOME IN ITEMS 1 TO 11 \$

DEDUCTIONS

13. Interest Paid \$

14. Taxes Paid. (Explain in Schedule E) \$

15. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2) \$

16. Bad Debts. (Explain in Schedule E) \$

17. Contributions. (Explain in Schedule E) \$

18. Other Deductions Authorized by Law. (Explain in Schedule E) \$

19. TOTAL DEDUCTIONS IN ITEMS 13 TO 18 \$

20. NET INCOME (Item 12 minus Item 19) \$

Ferry
3030 Chevy Chase
Glendale, Cal.
EXHIBIT
No T. paid
Filed 6/7/35
LA

850830

41543

651736

326581

1019860

218962

20971

COMPUTATION OF TAX (See Instruction 23)

- Net Income Subject to Tax (Item 20 above) \$ *None*
- Less: Interest on Liberty Bonds, etc. (Item 18) \$
- Dividends (Item 10 (a)) \$
- Personal Exemption \$
- Credit for Dependents \$
- Total of Items 22 to 25 \$
- Balance subject to Normal Tax (Item 21 minus 26) \$
- Amount taxable at 4% (not over \$4,000) \$
- Amount taxable at 8% (over \$4,000) \$
- Amount of Capital Net Gain or Loss (if not reported as Item 30) (From Schedule C) \$

- Normal Tax on \$4,000 \$
- Normal Tax on \$4,000 \$
- Surtax on Item 20 \$
- Tax on Net Income \$
- Adjustment for Capital Gains \$
- Total Tax \$
- Less: Income Tax Paid at Source \$
- Income Tax Due \$
- Balance of Tax (Item 7 minus Item 8) \$

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me and is true and correct, and that the information furnished therein is true and correct, and that the return is made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the Regulations issued thereunder.

(See Instruction 27)

(If return is made by agent, the name thereof must be stated)

Sworn to and subscribed before me this *14* day of *March*, 1934.

Peter L Ferry
3030 Chevy Chase
Glendale, Cal.

1. Total receipts from business or profession (state kind of business)
 Cost of Goods Sold
 2. Labor
 3. Material and supplies
 4. Merchandise bought for sale
 5. Other costs (itemize below or on separate sheet)
 6. Plus inventory at beginning of year
 7. TOTAL (Lines 2 to 6)
 8. Less inventory at end of year
 9. NET COST OF GOODS SOLD (Line 7 minus line 8)

Ranching

OTHER BUSINESS DEDUCTIONS
 10. Balance not included as labor or material, but not deduct compensation for your services
 11. Interest on business indebtedness
 12. Taxes on business and business property
 13. Losses, expenses on title at first of year
 14. Bad debts arising from sales or services
 15. Depreciation, obsolescence, and amortization (attach schedule provided as part of return)
 16. Losses, repairs, and other expenses on business property (attach schedule provided as part of return)
 17. TOTAL (Lines 10 to 16)
 18. TOTAL DEDUCTIONS (Line 9 plus line 17)
 19. NET PROFIT OR LOSS (Line 1 minus line 18)

Enter "C", or "C or M", on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 5 and 16.

Rover Bills, Rancher's Payable, Depreciation on Ranch, Depreciation on Equipment
1/2 claimed by B. & R. Co.

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instructions)

| 1. KIND OF PROPERTY | 2. AMOUNT RECEIVED | 3. COST OR VALUE AS OF MARCH 1, 1932, WHEN ACQUIRED | 4. DEPRECIATION EXPENSE (attach schedule) | 5. REPAIRS | 6. OTHER DEDUCTIONS |
|---------------------------------|--------------------|---|---|------------------|---------------------|
| <i>148 Evans Drive, Chicago</i> | <i>\$ 424.61</i> | <i>\$ 2,940.00</i> | <i>\$ 588.00</i> | <i>\$ 375.00</i> | |

Explanation of deductions claimed in Column 6.

SCHEDULE C—PROFIT OR LOSS FROM SALE OF STOCKS, BONDS, REAL ESTATE, ETC. (See Instructions)

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. DATE SOLD | 4. AMOUNT REALIZED | 5. COST | 6. GAIN OR LOSS (Column 4 minus column 5) | 7. DEPRECIATION EXPENSE (attach schedule) | 8. REPAIRS | 9. OTHER DEDUCTIONS |
|---|--------------------------------|--------------|--------------------|---------|---|---|------------|---------------------|
| (a) STOCKS AND BONDS* HELD TWO YEARS OR LESS: | <i>No Day Year No Day Year</i> | | \$ | \$ | \$ | | | |
| Total (a) (Transfer net profit to Item 8 (a)) | | | XXXXX | XXXXX | \$ | | | |
| (b) OTHER ASSETS HELD TWO YEARS OR LESS: | | | \$ | \$ | \$ | | | |
| Total (b) (Transfer net profit or loss to Item 8 (b)) | | | XXXXX | XXXXX | \$ | | | |
| (c) CAPITAL ASSETS: | | | \$ | \$ | \$ | | | |
| Total (c) (Transfer net gain or loss to Item 8 (c) or 30) | | | XXXXX | XXXXX | \$ | | | |

* As defined in Section 23 (t), 1932 Act. State how property was acquired.

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions)

| 1. OBLIGATIONS OR SECURITIES | 2. AMOUNT PAID | 3. INTEREST RECEIVED | 4. PRESENT VALUE (attach schedule) | 5. GAIN OR LOSS (Column 3 minus column 4) |
|---|----------------|----------------------|------------------------------------|---|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia | | \$ | | |
| (b) Securities issued under Federal Farm Loan Act, or under such Act as amended, and obligations of United States possessions | | | | |
| (c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917 | | | | |
| (d) Liberty 4% and 4½% Bonds and Treasury Bonds | | | | |
| (e) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness | | | | |

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Burch, J. M. Co. Suburban Arroyo Bog Tanks
Based on Rental Property

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

| 1. KIND OF PROPERTY (If buildings, state material of which constructed) | 2. DATE ACQUIRED | 3. AGE WHEN ACQUIRED | 4. USE (For example, office, residence, etc.) | 5. COST | 6. DEPRECIATION (attach schedule) | 7. GAIN OR LOSS (Column 5 minus column 6) |
|---|------------------|----------------------|---|-----------------|-----------------------------------|---|
| <i>148 Evans Drive, Chicago</i> | <i>1920</i> | <i>New</i> | <i>25 years</i> | <i>2,940.00</i> | <i>424.61</i> | <i>424.61</i> |
| <i>Depreciation on Equipment</i> | <i>1933</i> | <i>5 years</i> | <i>5 years</i> | <i>486.30</i> | <i>20.00</i> | <i>20.00</i> |

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN B

| 1. KIND OF PROPERTY | 2. DATE ACQUIRED | 3. AMOUNT RECEIVED | 4. DEPRECIATION EXPENSE (attach schedule) | 5. REPAIRS | 6. OTHER DEDUCTIONS |
|---------------------|------------------|--------------------|---|------------|---------------------|
| | | \$ | \$ | \$ | \$ |

[DEFENDANT'S EXHIBIT U]

[Stamps]

JOINT TENANCY DEED

- - - Bert L. Perry and Anna T. Perry, husband and wife, - - - in consideration of - - - Ten (10.00) - - - Dollars, to them in hand paid, the receipt of which is hereby acknowledged, do.....hereby Grant to Peter L. Ferry and Catherine B. Ferry, husband and wife, - - - - - As Joint Tenants all that real property in the City of Glendale, County of Los Angeles, State of California, described as: Lot Thirteen (13), Block Twelve (12); Sparr Heights, in the Rancho San Rafael, as per map recorded in Book 59, page 34 to 36 of Maps, in the office of the County Recorder of said County.

This deed is an absolute conveyance, the consideration therefor (in addition to that above recited), being full satisfaction of all obligations secured by that certain trust deed executed by Anna T. Perry and Bert L. Perry, her husband, to Johnston Finance Corporation, a corporation, Trustee, recorded in Book 6580, page 31 of Official Records of Los Angeles County.

Grantors acknowledge that this conveyance is freely and fairly made; that the consideration received by grantor is equal to the fair value of the grantors' interest in said land. and that there are no agreements, oral or written, other than this deed between grantors and grantees with respect to said land.

Witness our hands this 6th day of December, 1932.

Bert L. Perry,
Anna T. Perry.

Title Guarantee and Trust Company, 220 West Fifth
Street, Los Angeles, California

(Defendant's Exhibit U)

State of California

County of Los Angeles—ss.

On this 6th day of December, 1932, before me, Ethel Keary, a Notary Public in and for said County, personally appeared Bert L. Perry and Anna T. Perry, husband and wife, - - - known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

Ethel Keary

Notary Public in and for said County and State.

My commission expires June 25, 1936.

Joint Tenancy Deed

B. L. Ferry et ux

To

Peter L. Ferry et ux

Dated December 6, 1932

Title Guarantee

and Trust Company

Title Guarantee Building

Broadway at Fifth

Los Angeles, California

Capital and Surplus over \$7,000,000.00

Order No. 363

Escrow No. 942753-HFS

When Recorded Please Mail to:

Peter L. Ferry

3030 Chevy Chase

Glendale Cal.

(Defendant's Exhibit U)

Recorded at Request of Title Guarantee & Trust Co.
Apr 18 1934 at 8:30 A. M. In Book 12688 Page 265 of
Official Records, Los Angeles County, Cal. C. L. Logan,
County Recorder. I certify that I have correctly trans-
cribed this document in above mentioned book. O. Allen-
baugh, Copyist County Recorder's Office L. A. County.

Compared Read by Colon Document Terry

[Endorsed]: No. 2106 OC. Terry vs. Rogan. Deft.
Exhibit No. U in evid. Filed 6/8 1943. By Cross,
Deputy Clerk.

[Title of District Court.]

United States of America,
Southern District of California—ss.

I, *R. S. Zimmerman*, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of Defendant's Exhibits A, B, C, D, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T and U, received in evidence on the trial of case No. 2106-O'C Civil, Catherine B. Ferry, as Executrix of the last will and testament of Peter Ferry, Deceased, Plaintiff, vs. Ethel Strickland Rogan, as Executrix of the Estate of Nat Rogan, Collector of Internal Revenue for the Sixth District of California deceased, Defendant, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 11th day of December, A. D. 1944.

[Seal]

EDMUND L. SMITH,
Clerk,

By R. B. CLIFTON,
Deputy Clerk.

No. 10946

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the ESTATE
OF NAT ROGAN, Collector of Internal Revenue for the
Sixth District of California, Deceased,

Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last Will and
Testament of PETER FERRY, Deceased,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR THE APPELLANT.

SEWALL KEY,

Acting Assistant Attorney General,

A. F. PRESCOTT,

JAMES P. GARLAND,

Special Assistants to the Attorney General.

CHARLES H. CARR,

United States Attorney,

EDWARD H. MITCHELL,

Assistant United States Attorney.

United States Postoffice and
Courthouse Bldg., Los Angeles (12),

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No. 10946

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the ESTATE
OF NAT ROGAN, Collector of Internal Revenue for the
Sixth District of California, Deceased,

Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last Will and
Testament of PETER FERRY, Deceased,

Appellee.

BRIEF FOR THE APPELLANT.

Opinion Below.

No formal opinion was handed down by the District Court in this case. Findings of fact and conclusions of law were filed by the court. [R. 45-67.] The case is not reported.

Jurisdiction.

This appeal involves federal estate taxes. The taxes in dispute were paid as follows [R. 458-462]: \$16,905.17 on June 1, 1936; \$48,500 on April 8, 1937; \$15,000 on April 30, 1937; \$8,000 on June 12, 1937; \$33,675 on July 27, 1937; and \$3,106.85 on November 29, 1936. Appellee

filed a claim for refund, hereinafter more particularly referred to, in the amount of \$63,825.77 on February 9, 1939. [R. 462-463.] The claim for refund was rejected by notice dated October 18, 1940. Within the time provided in Section 3772 of the Internal Revenue Code and on March 5, 1942, appellee brought an action in the District Court for the recovery of a portion of the federal estate taxes paid on behalf of the estate of Peter Ferry, deceased. [R. 2-11.] Judgment in favor of appellee in the sum of \$63,825.77, with interest from the date of the payment of the tax, was entered on April 19, 1944. [R. 68-70.] Within three months and on July 18, 1944, a notice of appeal was filed. [R. 71.] The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended. The appellee claims and the appellant denies that the District Court had jurisdiction over the claim under Section 3772(a)(1) of the Internal Revenue Code, providing that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any sum alleged to have been excessive, or in any manner wrongfully collected, until a claim for refund has been duly filed with the Commissioner, according to the provisions of law in this regard and the regulations of the Secretary of the Treasury established in pursuance thereof. While, as above stated, a claim was filed on February 9, 1939, it is appellant's contention that there is a variance between the basis of the claim for refund and the grounds upon which the case was presented and tried in the District Court. The judgment below was rendered on issues not presented in the claim for refund.

Question Presented.

Whether the issue or grounds upon which the judgment was based was contained in a claim for refund or in any amendment to the claim. In other words, was the Commissioner of Internal Revenue ever afforded the opportunity to pass on a claim based on the grounds presented to the District Court and decided in favor of appellee?

Statute and Regulations Involved.

Internal Revenue Code:

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. [26 U. S. C., 1940 ed., Sec. 3772.]

* * * * *

Treasury Regulations 80 (1934 ed.):

Art. 99. *Claim for refund.*—A claim for refund of estate tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that

it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund.

* * * * *

Statement.

The findings of the District Court, which included the stipulation of facts [R. 457-561], are substantially as follows [R. 45-62]:

Peter Ferry died a resident of California on June 16, 1935. Appellee is decedent's widow and the executrix of his estate. [R. 457.] She filed on June 1, 1936, with the Collector of Internal Revenue at Los Angeles, a federal estate tax return [R. 458] on behalf of the estate, reporting a net estate for the tax imposed under the Revenue Act of 1926 of \$162,537.99 and a net estate for the additional tax imposed by the Revenue Act of 1932 of \$212,537.99. [R. 491.] A total net tax of \$16,905.17 was reported and paid at the time of the filing of the return. [R. 458.] After audit and review of the return the Commissioner of Internal Revenue determined that the correct tax liability of the estate amounted to \$147,273.32. [R. 461, 500-501.] The additional taxes were paid to the Collector of Internal Revenue in 1937 and 1938. [R. 458-460.] The deficiency resulted primarily from the inclusion in decedent's taxable estate of the entire value, as of the date of decedent's death, of the *corpus* of five trusts [R.

49, 463-465] and the inclusion of the entire value, as of the date of decedent's death, of certain life insurance policies issued on the life of decedent, which policies aggregate in value \$331,632.72. [R. 57.] The value of the property of the five trusts included by the Commissioner of Internal Revenue in the estate aggregated \$608,289.71. [R. 463-465.] The five trust indentures, above referred to, contained provisions that the decedent could, with the consent of certain of the beneficiaries, revoke, alter or change the trusts. [R. 516-517, 527, 539, 546, 559.]

The findings of the District Court are also to the effect that appellee filed, on behalf of the estate, on February 9, 1939, a claim for refund with the Collector of Internal Revenue, in the amount of \$63,825.77. [R. 45, 462, 509.] All of the pertinent portions of the claim for refund reads as follows [R. 504-505, 506-507, 508]:

“That on the above date a Federal estate tax return was duly filed by claimant for the estate of Peter Ferry, claimant's deceased husband, and payment of the tax, \$16,905.17, was made at that time. Subsequently further payments were made at different periods in contemplation of deficiencies certain to be assessed against the estate, which payments were acknowledged by the Collector for the Sixth district of California in a letter of July 28, 1938 to claimant. Also, an additional payment of \$3,106.85 was made on November 29, 1938.

“The first deficiency was assessed against the estate in a notice sent from the Commissioner of Internal Revenue to claimant on August 4, 1937. Other assessments against the estate were made from time to time.

“That among the items included in the first deficiency tax assessed were (1) increase in valuation of insurance policies over the values claimed when the estate tax return was filed and (2) certain transfers by the decedent and his wife of their property in trust as follows, in the order in which they appear on the return, Form 706.

| | |
|-----------------------------------|-------------------------|
| Item 1—Trust No. 6204 | \$195,850.37 |
| Item 2— “ “ 2012 | 82,289.16 |
| Item 3— “ “ S-5869 | 108,363.36 |
| Item 4— “ “ SS-4358 and
4358-A | 95,182.02 |
| Item 5— “ “ P-1052 | 125,604.80 ¹ |
| Item 6— “ “ S-1080 | 2,547.74 |

“That each of these trusts were included in the decedent’s gross estate under the provisions of Section 302(c) and/or (d) of the Revenue Act of 1926, as amended, and, moreover, the full value of each, with the exception of Trust No. S-1080, was included to become a part of the deficiency, and in this respect the claimant alleges as follows:

* * * * *

“That in each and every of said trusts it will be noted that both the decedent and his wife are the trustors. The creation of such trusts effected between the decedent and his wife a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided one-half ($\frac{1}{2}$) interest in the property which comprised the *corpus* of the trust. In California a husband and wife may make a property settlement agreement. See Section 158, California

¹This figure is stipulated to be in the amount of \$126,604.80. [R. 464-465.]

Civil Code. In California contracts may be either expressed or implied. See Section 1619, California Civil Code. An implied contract is one the existence of terms of which is manifested by conduct. See Section 1621, California Civil Code.

“That it can not be doubted that in the instant matter the decedent and his wife by their conduct in placing their property in trust effected a property settlement agreement and that, therefore, each would be the owner at the time of the creation of such trusts of an undivided one-half ($\frac{1}{2}$) interest in the property comprising the *corpus* of said trusts as hereinbefore stated; that, therefore, no more than one-half ($\frac{1}{2}$) of the value of the *corpus* of such trusts would be included in the gross estate of the decedent for federal estate tax purposes. Further, if the trusts had been revoked or could have been revoked, the property would have vested in the decedent and his wife as tenants in common, since upon the revocation of a trust the *corpus* of such trust reverts in the trustors thereof. See Section 2280 of the California Civil Code. Such transfers, therefore, should not be included in the gross estate of the decedent to the full extent of their value but, at most, should be included only as to one-half ($\frac{1}{2}$) of the value of the *corpus* of said trusts.

* * * * *

“That the community interest of the decedent’s wife should not be included in the valuation of the insurance policies as it was in the deficiency assessment (*Lang v. Commissioner*, 304 U. S. 264), and the values claimed in the estate tax return filed are the true values of such insurance policies.

“Claimant is informed and believes and therefore states that the agent based his denial of the contentions made herein by reason of the Commissioner’s

failure to acquiesce in the case of *Goodyear v. U. S.*, 99 Fed. (2d) 523. The facts of the instant matter we respectfully submit, come squarely within the principles laid down in the *Goodyear* case, and only by reason of the nonacquiescence of the Commissioner in said case has the instant overpayment as herein set forth arisen.²

On or about April 4, 1940, appellee filed with the Commissioner of Internal Revenue a protest. [R. 22-27, 47.] The protest is as follows [R. 23-24, 26-27]:

“Protestant is dissatisfied with the proposed determination and assigns errors specifically as follows:

First: That the Commissioner has erred in increasing the gross estate by including therein certain trusts specifically set out in the Commissioner’s letter of August 4, 1937.

Second: That the Commissioner erred in increasing valuations of items of insurance as set out in his said letter of August 4, 1937.

Third: That the Commissioner erred in refusing to allow the full amount of deductions shown in the Federal Estate Tax Return filed and in allowing only the amount of deductions to the extent of the value of the probate estate.

That with respect to ‘First’ and ‘Third’ all of the statements contained in protest dated October 29,

²Since the issue before this Court is whether the claim, or the claim and protest or protests taken together, presented the grounds upon which the judgment was based, it is considered appropriate to set forth herein the relevant portions of the claim and the protests of April 4, 1940, and October 29, 1937.

1937, and heretofore filed,³ protesting the determinations made in your letter of August 4, 1937, together with all of the allegations contained in claim for refund executed and dated on or about February 10, 1939, and filed on or about February 20, 1939, are herein realleged and incorporated as though fully set forth herein and thereby made a part hereof.

From the foregoing, your protestant alleges that a sum greatly in excess of the amount claimed in the Federal Estate Tax Return should be excluded from the gross amount of insurance payable by reason of the death of said decedent. That your protestant is desirous of cooperating fully with your office and will attempt to furnish such additional information as your examining officer may deem necessary, in so far as her ability will provide.

In conclusion, your protestant submits that only one-half of the *corpus* of the said trusts should have

³The protest dated October 29, 1937, referred to in the protest of April 4, 1940, is similar, in its grounds and allegations, to the claim and to the protest of April 4, 1940. The pertinent portions of the 1937 protest reads as follows [R. 916, 917]:

"In each and every of said trusts it will be noted that both the decedent and your protestant are the trustors. The creation of such trusts effected between the decedent and your protestant a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided one-half ($\frac{1}{2}$) interest in the property which comprised the *corpus* of the trust.

* * * * *

"It cannot be doubted that in the instant matter the decedent and protestant by their conduct in placing their property in trust effected a property settlement agreement and that, therefore, each would be the owner at the time of the creation of such trust of an undivided one-half ($\frac{1}{2}$) interest in the property comprising the *corpus* of said trust, as hereinbefore stated; that, therefore, no more than one-half ($\frac{1}{2}$) of the value of the *corpus* of such trusts would be included in the gross estate of the decedent for Federal estate tax purposes. * * *

been included in decedent's gross estate; that a sum greatly in excess of that claimed in the Federal Estate Tax Return should have been excluded from the insurance payable by reason of decedent's death; that the deductions taken by the estate of decedent should have been allowed in full and should not have been limited to the amount of debts and deductions payable out of said probate estate.

* * * * *

From the foregoing, therefore, it is urgently requested that reconsideration be made by your office with respect to the proposed determinations incorporated in your letter of August 4, 1937, and the proposed determinations reported in your letter of February 20, 1940, and that a statement of protest of protestant dated October 29, 1937, and the claim for refund heretofore filed herein, and this protest be given your deep consideration and that upon such reconsideration in the light of the foregoing, protestant's claim be allowed."

The claim for refund filed February 9, 1939, was rejected by the Commissioner of Internal Revenue and notice thereof, dated October 18, 1940, was given the appellee. [R. 463, 509-511.] The grounds upon which the claim was rejected is set forth in the notice of rejection as follows [R. 509-511]:

"Reference is made to the claim on Form 843 filed on February 9, 1939, on behalf of the above-named estate for the refund of \$63,825.77, Federal estate tax paid, 'or such greater amount as is legally refundable with interest.' The claim involves two issues, first, as to whether the amount of \$32,561.48, representing proceeds of insurance payable to beneficiaries other than the estate in excess of the \$40,000.00

exemption, should be included in the gross estate of the decedent; and the other as to whether the amount of \$610,837.45, representing property transferred prior to the enactment of section 161(a) of the California Code, is includible in the gross estate to the extent of the entire *corpus* thereof on the basis of the terms of certain trust instruments.

That in addition, your protestant refers to the case of Hill, 24 B. T. A. 1144, and the decisions of the California Courts therein cited.

That with respect to the second error herein assigned your petitioner alleges that the premiums paid for the insurance policies included in decedent's Federal Estate Tax Return and set forth in your letter of August 4, 1937, were paid for out of the community income of decedent and his wife acquired from and after July 29, 1927, and from the separate property of decedent and from the separate property of decedent's wife. That in that connection the facts are:

Decedent owned and operated a business known as Peter L. Ferry, which business carried on a street paving enterprise. That Peter L. Ferry carried on said business as the sole proprietor and as an individual. That the total value of all assets of the business on February 29, 1927 was not in excess of \$25,000.00. That the physical assets of the business play a very minor part in the income produced by said business and received by said decedent. That the major factor in producing income from said business was the experience in said business of Peter L. Ferry, his contacts in getting the business, and his ability to carry out the contracts, his reputation in the business and his personal skill.

That all of the income derived by said Peter L. Ferry from the street paving and contracting business

should be assigned to his personal services and none thereof to the physical assets of the business.

The said Peter L. Ferry and his wife carried a joint bank account at all times herein material, into which were deposited the community earnings of Peter L. Ferry and his wife, the separate earnings of his wife, and his own separate income. That from said joint bank account were paid all of the bills of decedent and his wife. That the amount of money in said bank account on August 1, 1927 was \$5,-650.23.

* * * * *

Premiums were paid on the insurance policies from the bank account of decedent and his wife in the American National Bank of Glendale, California, and the First National Bank of Glendale. That your protestant will furnish to the examining officer a statement of the payment of premiums on each of the insurance policies upon his request, showing payment of premiums from and after July 29, 1927 to the date of decedent's death.

With respect to the first issue you contend that the life insurance policies should not be taxed in full, but an allowance should be made of the claimed community interest stated to be vested in you. You rely on the case of *Lang v. Commissioner*, 304 U. S. 264 (20 A. F. T. R. 1251) and the case of *Elizabeth C. McCoy, Administratrix*, 37 B. T. A. 114.

The Bureau has considered the cases cited and is of the opinion that they are not controlling in this case. It appears that all of the policies in this case were taken out by the decedent upon his own life. They were the usual standard form of policy, giving his legal incidents of ownership such as changing the beneficiary, assignment and the like. They thus

come within the express wording of Article 25 of Estate Tax Regulations 80. No evidence has been submitted showing that any part of the premiums was paid out of community funds.

With respect to the second issue you contend that the six trusts are taxable only to the extent of one-half because the establishment of the trusts amounted to a property settlement between the decedent and yourself, giving you a vested interest therein.

It appears that the corpus of all six of the trusts was acquired by the decedent during coverture prior to the enactment of section 161(a) of the California Civil Code giving the wife a vested interest in the community. Prior to the enactment of this section of the Code, the wife had a mere expectancy in the community. The rights of the husband were so complete that the husband was the owner of the community. *U. S. v. Robbins*, 269 U. S. 315. The fact that the wife became a cotrustor is therefore without significance or effect. She contributed nothing of her own and her participation was a mere formality.

It is contended that the legal effect of these trusts was to constitute the wife a tenant in common with her husband in the corpus thereof. There is nothing to indicate that the wife acquired any additional property or property rights by becoming a signatory to the trust instruments. It may be assumed, without conceding that upon revocation of any of the trusts the corpus by the terms of the instruments would have become the property of the trustors, in which event a tenancy in common might have been created. However, none of the trusts was revoked during the decedent's lifetime. The fact remains that the transfers were made by decedent after the enactment of the Revenue Act of 1924, and the decedent reserved the power, to alter, revoke or amend the

trusts, with the concurrence of certain (but less than all) of the beneficiaries, and such power was in existence at the date of decedent's death. The transfer, therefore, comes within section 302(d) of the Revenue Act of 1926.

On the basis of the foregoing, and since there does not appear to be an overpayment of Federal Estate tax in this case, the claim filed on February 9, 1939, for the refund of \$63,825.77 is rejected in its entirety."

The District Court found that [R. 53]:

"* * * immediately prior to the marriage of plaintiff, Catherine B. Ferry, and said decedent, Peter L. Ferry, in the year 1906, they entered into an agreement with each other to the effect that immediately upon marriage they would become equal financial partners and that all earnings and all property theretofore or thereafter acquired by either or both of them, would be owned equally and 50-50 by them and that all property acquired by either or both of them would be owned jointly and all losses by either or both of them would be shared equally."

The court concluded that because of the agreement of 1906 [R. 63-64]:

"* * * Catherine B. Ferry owned one-half ($\frac{1}{2}$) of all property transferred at any time to each and every trust included by the Commissioner of Internal Revenue in the gross estate of said decedent, * * * and that one-half ($\frac{1}{2}$) of the value of the corpus of each and every trust was not includable in the gross estate of said decedent and that one-half ($\frac{1}{2}$) of the value of the corpus of each and every trust was not subject to Federal Estate Tax * * *."

Further, because of the agreement of 1906 [R. 62]:

“* * * one-half ($\frac{1}{2}$) of the value of the proceeds of all the insurance policies upon the life of Peter Ferry, should not have been included in the gross estate of said decedent * * * and should have been excluded from the gross estate * * * in determining the taxable gross estate of said decedent for Federal Estate Tax purposes.”

Statement of Points to Be Urged.

1. The District Court erred in admitting evidence of and basing its decision on an oral agreement between appellee and decedent in 1906, relative to the property comprising the corpus of five trusts and to the funds used for the payment of the premiums on the life insurance, where, as here, the claim for refund and any amendments thereto were based on other and different grounds.

2. The court erred in that there is no evidence to support its findings that the Commissioner considered and acted on the grounds for recovery asserted by appellee in her “Pre-Trial Brief” and “the grounds of recovery upon which the decision in this matter by the within Court are based, and the grounds of recovery adduced at the trial.”

3. The court erred in admitting evidence of or considering in its findings or conclusions any evidence to the effect that appellee’s separate funds were used to pay premiums on the decedent’s life insurance, since the claim for refund, and any amendments thereto, was based on other and different grounds.

4. The court erred in admitting evidence of and considering in its findings and conclusions any evidence relative to the trust property or any portion thereof having been held in joint tenancy or tenancy in common, since the claim for refund and any amendments thereto was based on other and different grounds.

Summary of Argument.

The District Court erred in admitting evidence and deciding this case on issues not raised in appellee's claim for refund or in any amendment thereto. The claim was based on the grounds that the execution of certain trust instruments made appellee a contributor of one-half of the corpora thereof, and on the grounds that she had a vested community property interest in the premiums used to pay decedent's life insurance. The District Court gave judgment to appellee on the grounds that she owned one-half of all the property by reason of an oral agreement between appellee and decedent, entered into in 1906, and on the grounds that one-half of the life insurance premiums were paid from her own or separate funds. The variance between the claim for refund and the grounds upon which the judgment is based requires reversal.

ARGUMENT.

Judgment in This Case Is Based on Grounds Not Presented in the Claim for Refund.

It is well settled that a suit for the recovery of federal taxes must be grounded on a claim for refund. Section 3772 of the Internal Revenue Code, *supra*, formerly Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Section 1103(a). This Court stated the rule that the suit must be based on the grounds set forth in the claim for refund in *B. F. Goodrich Co. v. United States*, 135 F. (2d) 456, affirmed, 321 U. S. 126, as follows (p. 461):

“The only logical conclusion that can be drawn from a consideration of §3226 is that the claim for refund, which must be filed with the Commissioner as a condition precedent to maintaining a suit for recovery of a tax, is the identical claim upon which said suit must be based. * * *”

The holding of this Court in that case is well supported by the authorities. See *Tucker v. Alexander*, 275 U. S. 228; *United States v. Felt & Tarrant Co.*, 283 U. S. 269; *Maryland Casualty Co. v. United States*, 251 U. S. 342; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62; *Angelus Milling Co. v. Commissioner*, 325 U. S. 293, rehearing denied, June 18, 1945.

The claim for refund and the protests filed by appellee, in so far as are relevant to this appeal, are based solely on the grounds as follows:

1. That one-half of the corpora of the five trusts, here involved, should be excluded from decedent's tax-

able estate because the creation of the five trusts and the execution of the trust instruments [R. 506]:

“* * * effected between the decedent and his wife a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided one-half ($\frac{1}{2}$) interest in the property which comprised the corpus of the trust. * * *”

2. That there should be excluded from decedent's taxable estate that portion of the life insurance on decedent's life attributable to the premiums paid from appellee's community interest in the community property acquired after July 29, 1927, the effective date of Section 161(a) of the California Civil Code. Those were the only grounds mentioned and passed on by the Commissioner of Internal Revenue in his letter of rejection. Appellee conceded that the corpora of the five trusts and the proceeds of the life insurance, other than the contributions thereto by appellee, were properly taxed. [R. 88.]

Appellee tried the case below on the following grounds:

1. That one-half of the corpora of the five trusts, here involved, should be excluded from decedent's taxable estate on the grounds that appellee and decedent entered into an oral agreement in 1906, to the effect that they would each own one-half of all property acquired by either during marriage, and that as a consequence decedent's contribution to the corpora of the trusts did not exceed one-half of the total thereof. [R. 77.]

2. That one-half of the proceeds of the life insurance should be excluded from decedent's taxable estate on the

grounds that appellee paid one-half of the premiums from her separate funds.

The court below based its judgment in favor of appellee on the finding that under the oral agreement between appellee and decedent, entered into in 1906, appellee was the owner and the contributor of one-half of the corpora of the five trusts here involved and that she paid from funds belonging to her one-half of all the premiums on the life insurance policies. [R. 55-62.] It is submitted that there exists a fatal variance between the grounds alleged in the claim for refund and the grounds upon which the judgment was based.

The District Court found that [R. 61]:

“* * * the grounds of recovery adduced at the trial of the issues in the within matter were each and all fully considered and acted upon by the Commissioner of Internal Revenue in the rendition of his final determination of the liability of said estate of Peter L. Ferry for Federal Estate Tax; * * *”

That finding is not supported by any of the evidence but is contrary to all of the evidence in this case. The existence of an oral agreement between appellee and decedent, entered into in 1906, is not stated or intimated in the claim for refund, in the 1937 protest, in the 1940 protest, or in any other papers filed or submitted to the Commissioner of Internal Revenue, the Collector of Internal Revenue or any revenue agent prior to the commencement of this action. The same is true with regard to the contention made at the trial that appellee used her separate funds for the payment of insurance

premiums and that any of the property transferred to the trust was held by appellee and decedent as joint tenants or as tenants in common. That fact was observed and commented on by the court below when counsel for appellant proposed to introduce in evidence all of the records of the Treasury Department relative to this tax matter for the purpose of showing that nothing contained in the Government's files suggested the existence of the oral agreement or, that the insurance premiums were paid from appellee's separate funds or, that any of the trust property was ever held in joint tenancy or as tenants in common. Appellant's counsel at the trial stated [R. 323-324]:

“* * * I might state, in answer to counsel's objection to the offer, that the purpose, of course, is to establish that the new contentions and grounds raised at the trial were not considered by the Commissioner; and that the position of plaintiff that the Commissioner, through any of his agents, has waived the variance between the refund claim and the suit by considering these new grounds, does not exist; that is, that the new questions were not considered by the department and the defense of the variance thereby waived. And in order to do that it is necessary, of course, to prove a negative fact, to introduce all of the files in this case. Whether they are the files of the technical staff, whether they are the files of the revenue agent, or whether they are the files from the Commissioner's office in Washington, all will have to be introduced to negative the contention now made by the plaintiff that the defense of variance was waived by the Commissioner.”

The District Court then commented as follows [R. 324, 326]:

“Mr. Mitchell, what evidence on the part of the plaintiff is there here that the Commissioner waived that? I do not recall any testimony on the part of the plaintiff.

* * * * *

The point is, I do not recall any testimony, Mr. Mitchell, that has been tendered here by the plaintiff that the matters that you are mentioning were considered by the Commissioner. We have the Commissioner's letters, they are clear, and that is all that we have, and they state the grounds upon which he decided these questions. * * *

* * * * *

I will admit the exhibit for the limited purpose offered, that the confidential files do not show that there was any discussion by the Commissioner of the grounds suggested by counsel.

However, as I state again, I do not recall any evidence in the plaintiff's case, but for that limited purpose the exhibit will be admitted. * * *

The only evidence, relative to the point, introduced in evidence by appellee, subsequent to the court's comments above, was appellant's pre-trial brief, filed in the District Court, which contained reference to the issues presented at the trial. [R. 441.] The material in appellant's pre-trial brief relative to the issues not presented in the claim for refund was put in the brief because counsel for appellee requested counsel for appellant to enter into a stipulation shortly prior to the pre-trial hearing, relative to the newly presented issues. [R. 442-443.]

Throughout the entire trial counsel for appellant objected to any evidence relative to the oral agreement of 1906, relative to the payment of insurance premiums from appellee's separate funds, and relative to the property held in joint tenancy or tenancy in common prior to its transfer in trust, on the grounds that the suit must be based on the grounds set forth in the claim for refund and that the court was without jurisdiction to consider different grounds or issues. [R. 77, 84-88, 93, 96, 149-150, 169-170, 173-174, 179, 183-184, 185, 189, 199-201, 203, 207, 229, 324-326, 430.]

The record will show that revenue agents were assigned to investigate the federal estate tax return, the claim for refund, and the protests filed by appellee. Ample opportunity was afforded appellee, other members of decedent's family and appellee's counsel to make known to the agents the matters, grounds and issues subsequently presented by appellee at the trial. No information of any kind, regarding the oral agreement of 1906, or the property held in joint tenancy or tenancy in common, was given by any one to any of the investigating agents. [R. 248-249, 266-267, 327, 351-352, 356, 430.]

The reason why the claim for refund, protests and complaint or amended complaint did not refer to or even suggest the existence of the oral agreement of 1906, is quite evident. Appellee testified on cross-examination [R. 307] that she told her counsel for the first time of the existence of the oral agreement "about eight weeks ago," or only eight weeks prior to the trial of the case. The

District Court later in the trial commented on appellee's testimony as follows [R. 330]:

"Mrs. Ferry herself has stated that the first time she mentioned that [referring to the agreement of 1906] was some eight weeks before this trial."

The court further stated [R. 331]:

"Aren't we bound by the two instruments, the claim and the amendment to the claim? [Referring to the protest of April 4, 1940.] Can we read anything into them that is not there?"

If anything further is needed to show that the oral agreement of 1906 was a mere afterthought and presented for the first time at the trial, we need only examine the federal estate tax return where appellee stated that decedent [R. 608] "desired to and did by the creation of these trusts enter into a property settlement with his wife" and her statement [R. 609] that:

"It is further contended that the interest retained by Catherine B. Ferry in the trusts hereinbefore set forth was not transferred to her by decedent but represents the community property acquired by decedent and Catherine B. Ferry since their marriage. * * *"

Appellee's execution of the trust indentures, as one of the trustors, is explained by her statement in the federal estate tax return [R. 609]:

"That it was necessary, and affiant, Catherine B. Ferry, did, join in the creating of these trusts, hereinbefore set forth and in so creating these instruments affiant received only that which was already her property pursuant to the laws of the State of California. [Meaning, of course, the laws with regard to community property.] * * *"

It is also significant that appellee made no claim in the return, claim for refund, protests, or otherwise that she was entitled to one-half of the stocks, bonds, cash or to the other property standing in the name of the decedent. If appellee had recalled the 1906 agreement at the time of the filing of the return, or the claim, or the protests, or at any time prior to the running of the statute of limitations for the filing of a claim for refund, she would have asserted her rights to one-half of all the property shown in the federal estate tax return. The findings of the District Court in this case would have entitled her to do so.

As pointed out to the District Court [R. 430], no evidence was produced to show that any of the premiums on the life insurance were paid from community property of the so-called vested type acquired after the effective date of Section 161(a) of the California Civil Code and the District Court made no finding to the contrary. As to appellee's burden of proof see *Rule v. United States* (C. Cls.), decided December 3, 1945 (1945 C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,241). It is equally clear that judgment for appellee cannot be sustained on the grounds that the mere execution of the trust indentures gave rise at that time to a division of the trust property such as to make her a contributor of one-half of the corpora of the trusts. The entire record indicates that appellee abandoned that contention. Furthermore, her execution of the trust indentures was required

by the trustees because the trusts contained California community property (acquired prior to the effective date of Section 161(a) of the California Civil Code). That is the substance of appellee's statement in the federal estate tax return. [R. 609.] As above stated, the claim and protests were not based on, nor did they refer to, the fact that some of the properties transferred in trust were held prior thereto by appellee and decedent as joint tenants or tenants in common. The District Court erred in admitting any evidence relative thereto; furthermore, so far as the claim and supporting papers are concerned, appellee made no contribution toward the purchase of any of the properties. Consequently, the entire value of the properties so held would have been included in decedent's taxable estate had they not been transferred to a taxable trust. See *Tyler v. United States*, 281 U. S. 497; *United States v. Jacobs*, 306 U. S. 363.

The District Court erred in admitting any evidence on issues not raised in the claim for refund; that is, the court should have excluded any evidence relative to the oral agreement of 1906, to the payment by appellee of the insurance premiums from her separate funds, and any evidence relative to property held by appellee and decedent as joint tenants or tenants in common. The District Court erred in making any findings relative to those issues and erred in making the finding that the Commissioner was apprised of and considered such issues.

Conclusion.

The entire judgment of the District Court, except the portion thereof relating to trust No. 1080 concerning which no appeal was taken, should be reversed.

Respectfully submitted,

SEWALL KEY,

Acting Assistant Attorney General,

A. F. PRESCOTT,

JAMES P. GARLAND,

Special Assistants to the Attorney General.

CHARLES H. CARR,

United States Attorney,

EDWARD H. MITCHELL,

Assistant United States Attorney.

January, 1946.

No. 10946.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the Estate
of Nat Rogan, Collector of Internal Revenue for the
Sixth District of California, Deceased,

Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last Will and
Testament of Peter Ferry, Deceased,

Appellee.

BRIEF FOR APPELLEE.

CLAUDE I. PARKER,
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JOHN MOORE ROBINSON,

650 South Spring Street, Los Angeles 14,

Counsel for Appellee.

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No. 10946.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the Estate
of Nat Rogan, Collector of Internal Revenue for the
Sixth District of California, Deceased,

Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last Will and
Testament of Peter Ferry, Deceased,

Appellee.

REPLY BRIEF FOR APPELLEE.

The facts and the opinion are set out in the Record, to which the attention of this Honorable Court is respectfully directed.

Opinion Below.

No formal opinion was handed down by the District Court in this case. The Findings of Fact and Conclusions of Law were filed by the Court. [Record, pp. 45 to 67.]

No question of jurisdiction is involved.

QUESTION PRESENTED:

Whether the grounds upon which the judgment was based were presented in a Claim for Refund or in any amendment to the claim or were considered by the Commissioner in acting upon the claim or any amendment, or were before the Commissioner in acting upon the claim or any amendment, or whether the defects, if any, in the claim were waived?

Appellee respectfully submits that: She has fully and completely complied with the law, statutes, and regulations involved in this case.

I.

The Appellant Contends That the Appellee, Taxpayer, Did Not Comply With Section 3772, 26 U. S. C., 1934 Edition, and With the Treasury Regulations 80, 1934 Edition, Article 99. This Claim Is Unfounded.

Section 3772 provides that (a) there must be a Claim for Refund filed with the Commissioner of Internal Revenue and (b) that the Claim for Refund should conform to the regulations established by the Secretary of the Treasury.

The appellee, taxpayer, did file a Claim for Refund. [Record, p. 502 *et seq.*]

The Regulations say that the Claim for Refund must be made on Form 843. That was done. [Record, p. 502, Exhibit E, first two words.]

The Regulations say that the Claim for Refund must “. . . set forth in detail and under oath each ground upon which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof . . .”

(Treasury Regulations 80, 1934 Edition, Article 99. Quoted in Brief for the Appellant, pp. 3 and 4.)

The Claim for Refund conforms exactly to the Regulations. It presents all the facts that are pertinent to the issues in this case and all the claims that have been discussed and adjudicated in all the proceedings up to this point. [See Record, p. 502 *et seq.*, and a detailed analysis in II below.]

II.

The Claim for Refund Presented Three Points to the Commissioner of Internal Revenue.

1. The first point was that only one-half of the corpora of the trusts, with which this action is concerned, should have been included in the deceased husband's estate for Federal estate tax purposes, because

(a) There was an agreement made between the spouses as of 1905 that all of the property which either or both of the spouses acquired thereafter would be vested in them jointly, and each was to have ownership of a vested, undivided one-half interest. This agreement was confirmed by a long continued course of conduct extending up to the day of the death of the husband; and

(b) Each spouse put the one-half interest which that spouse owned into the corpora of the designated trusts; and

(c) The interest of each spouse was the interest which a joint-tenant always has. [Record, pp. 505-508.]

Form 706, the Federal Estate Tax Return, presented the same facts which were put into the Claim for Refund. [See Schedule E-1; Record, p. 562, at pp. 605 to 609.]

The Protest embodied the same claims which were presented in the Claim for Refund and the same facts which were set out in Form 706. [See Record, p. 953 at 954, fourth paragraph; Defendant's Exhibit F.]

The Complaint of the appellee, taxpayer, presents the same grounds for refund that the Claim for Refund presented. [Record, p. 2 at pp. 6, 7 and 8, first full paragraph.]

The Amended Answer of the Government specifically denied the allegations in the Complaint. [See Record, p. 12, at pp. 13 and 14.]

The Pre-Trial Brief of the Collector of Internal Revenue presented arguments on precisely the same claims which the Appellee-Taxpayer had put into her Claim for Refund and presented no other grounds. See Plaintiff's Exhibit No. 65, where "the ultimate questions" as phrased by government counsel are presented. [Record, pp. 835 and 841.]

The District Court made Findings of Fact which established factually the exact claims which the appellee had made in her Claim for Refund. [Record, pp. 53 to 56; Findings of Fact Nos. XX to XXX, inclusive.]

The District Court also decided the same questions of law which Appellee had presented in her Claim for Refund and which had been embodied in the Protest and which had been copied by the government in the Pre-Trial Brief, and decided them in favor of Appellee-Taxpayer. [Record, pp. 63 to 65; Conclusions of Law Nos. VIII to XIII, inclusive.]

2. The second point presented in the Claim for Refund was that one-half of the proceeds from the Insurance

Policies taken out on the life of the decedent husband belonged to the surviving wife, because all the premiums were paid out of funds which belonged equally to both spouses, so that one-half the proceeds belonged to the Appellee-Taxpayer and should not be taxed to the estate of the decedent husband. [Record, p. 502 at 508, first full paragraph.]

The Complaint of the appellee, taxpayer, clearly sets out the same facts and the issues relating to the insurance policies. [Record, p. 2 at p. 8, paragraph X.]

The Amended Answer by the government expressly deals with the Insurance Policies and avers that the appellant defendant was without truth or information sufficient to form a belief as to the truth of the averment that the wife had any interest in the insurance policies.

Thus, the facts concerning the Insurance Policies and the legal questions involved were clearly raised by the pleadings.

Form 706, the Federal Estate Tax Return, presented the same claim and the same facts upon which the Claim for Refund was based. [See Schedule C-2; Record, pp. 585-592.]

The Protest embodied the same claims which were included in the Claim for Refund and the same facts which were set out in Form 706. [Record, p. 954, "Second"; 955, 957, second full paragraph, last paragraph.]

The Pre-Trial Brief of the Collector of Internal Revenue presents and argues the same facts and questions of law which the appellee, taxpayer, sets out in her Claim for Refund. [Record, p. 835, at pp. 839 to 841.]

The District Court made Findings of Fact which established factually the precise claims which the appellee, taxpayer, had presented in her Claim for Refund. [Record, p. 45, at pp. 57 to 58; Findings of Fact Nos. XXXIII to XXXVI, inclusive.]

The District Court also decided the same questions of law which had been presented by appellee, taxpayer, in her Claim for Refund and which had been argued by Government Counsel in their Pre-Trial Brief. [Record, pp. 62-63; Conclusions of Law, Nos. 1 to IV, inclusive.]

3. The third point presented in the Claim for Refund was that the case of *U. S. v. Goodyear*, 99 F. (2d) 523 and *Lang v. Commissioner*, 304 U. S. 264, and the provisions of the California Civil Code, sections 158, 1619, 1621, 2280, were controlling in this case. [Record, pp. 506-507.]

Form 706 does not require any statement of the legal support for the data given in that form.

The Protest adds the case of *Hill v. Commissioner*, 24 B. T. A. 1144, to the cases adduced in the Claim for Refund.

The Pre-Trial Brief of the Collector of Internal Revenue discussed the *Lang* case [Record, pp. 840-841] and the *Goodrich* case, but ignored the provisions of the California Civil Code, and the *Hill* case.

The District Court made Findings of Fact which established factually that the Commissioner of Internal Revenue knew and considered all the claims made by the appellee, taxpayer, in her Claim for Refund, that the Pre-Trial Brief of the government contained the same material upon which the Claim for Refund was made, and that the Com-

missioner of Internal Revenue had not been “. . . at any time or in anywise or manner deceived, misled, or imposed upon by the trial of and the decision upon each and all of said grounds relied upon by the plaintiff . . .” [Record, p. 61, Findings of Facts, Nos. XXXVI, XXXVII, XXXVIII.]

The attention of this Honorable Court is respectfully called to the apposite language of Mr. Justice Stone (now Mr. Chief Justice Stone) in the case of *Tucker v. Alexander*, 275 U. S. 228 at 231, which says:

“The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose.”

The District Court reached Conclusions of Law and gave judgment for appellee, taxpayer, on the precise legal questions which were presented by the appellee, taxpayer, in her Claim for Refund. [Record, pp. 62 to 67, incl.]

Hence, the Record, as it comes before this Court, completely disproves the contention of the appellant that the decision of the Instant Court was based on the facts and claims which had been presented by the appellee, taxpayer, to the Commissioner of Internal Revenue in her Claim for Refund.

The Record establishes that the appellee-taxpayer, had fully conformed to Treasury Regulations No. 80 (1934 Edition) and to the provision of 26 U. S. C. 1940 Edition, Section 3772, which governs the Claim for Refund made by the appellee, taxpayer.

III.

It Is Respectfully Submitted That the Cases Cited by the Government Are Not at All in Point as to the Question Which Is Involved in This Appeal.

In the case of *Goodrich Company v. United States*, 135 Fed. (2d) 456, affirmed on other grounds 321 U. S. 125, the ground given in the claim for refund was that the right to a refund came as the result of an assignment from the former owner of the property which was subject to taxation, while the complaint alleged that the right to a refund came to the taxpayer because of the operation of law. The language quoted from this case by appellant was not considered, accepted, nor affirmed by the United States Supreme Court. (See *Goodrich v. United States*, 321 U. S. 126 at 127.)

In *United States v. Felt & Farrant Company*, 283 U. S. 269, the claim for refund gave as its sole ground for a refund that the taxpayer was entitled to special relief under section 210 of the Act of 1917, but the complaint

in the suit which was filed asserted a right to a refund because of a right to deductions which were based on the exhaustion and obsolescence of patterns.

In *Maryland Casualty Company v. United States*, 251 U. S. 342, the claimant, taxpayer, failed completely to follow the requirements of the statute.

In *United States v. Memphis Cotton Oil Company*, 288 U. S. 62, no grounds whatever were stated in the taxpayer's claim for refund.

In *Angelus Milling Co. v. Commissioner*, 325 U. S. 293, Rehearing denied June 18, 1945, the form which was required by the Regulations was not followed at all.

The case of *Tucker v. Alexander*, 275 U. S. 28, is not at all in point for the argument made by the government. We have quoted above the salient and most pertinent language in the case. The attention of this Court is respectfully directed once more to that language.

It is respectfully submitted that the cases cited by the Government can not be used as precedents in any sense in the instant case, where the grounds set out in the Claim for Refund and the grounds alleged in the Complaint in the District Court were exactly alike.

It would unnecessarily extend and cumber this brief to analyze those cases in detail.

There was no possibility that the Commissioner of Internal Revenue was not apprised of the facts and the claims which the appellee, taxpayer, had made and was making in this case.

IV.

Copies of All Five Trusts Were Submitted at the Time Form 706 Was Filed. Attached to All These Trusts Are Complete Lists of the Corpora of the Trusts, Stating in Detail the Contents.

However, on April 12, 1943, a Stipulation was entered into between E. H. Mitchell, Esq., for counsel for defendant, and Claude I. Parker, Ralph W. Smith and John Moore Robinson, Counsel for plaintiff. On pages 476 to 482, both inclusive [Vol. II, Exhibits] appear a detailed list of parcels of real property, wherein it was expressly stipulated as a fact that 24 parcels of real property were held by Peter Ferry and Catherine B. Ferry as joint tenants with right of survivorship, by deeds executed before the properties were placed in trust, and one parcel held as tenants in common.

We must digress and call the court's attention to the discussion of the California Supreme Court in the case of *Siberell v. Siberell* (1932), 214 Cal. 767, at 773, where the Court said:

“The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate. It would be manifestly inequitable and a subversion of the rights of both husband and wife to have them in good faith enter into a valid engagement of this character, and following the demise of either, to have a contention made that his or her share in the property was held for the community, thus bringing into operation the law of descent, administration, rights of creditors and other complications

which would defeat *the right of survivorship, the chief incident of the law of joint tenancy*. A joint tenancy is one estate and in it the rights of the spouses are identical and co-extensive." (Emphasis supplied.)

The importance of this stipulation with respect to the title to the real property before it was placed in trust cannot be minimized, because it destroys the government's contention that title to this real property should have been ignored by the court.

The traditional solemnity of stipulations between counsel and their binding effect have received such well established recognition that discussion of the effect of these stipulations should be superfluous.

However, the appellant's brief discloses obliviousness to this stipulation and it is therefore important to call this Court's attention to the binding effect of these stipulations, and quotations are hereby made as follows:

Oscanyan v. Winchester Arms Co., 103 U. S. 261 at p. 263, 26 L. Ed. 539:

"In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof; and if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." (See, also, 60 C. J., 57; 7 C. J. S., 921.)

It is further true that in the government's Pre-Trial Brief the government anticipated that the existence of the legal title as disclosed by the Stipulation would present contentions with which they disagreed.

All this is stated in rebuttal of the government's insistence that issues have been presented at the trial which it could not anticipate.

There is also confusion on the part of the government with respect to issues of law. The fact that the claim for refund and the various documents, protests, and stipulations of the taxpayer all contain facts from which different legal inferences can be drawn, imposes no duty upon the taxpayer to argue all questions of law in advance of the trial. It would be a strange theory that because the trial of the case unfolded new questions of law, that there has been an unfair advantage. This is particularly novel in a tax proceeding involving questions of law currently affected by a wealth of discussion in the Tax Courts, the Federal, District, and Circuit Courts, and in the United States Supreme Court, many conflicting and unsettled, particularly during the period following this controversy. It would be indeed an exceedingly exaggerated compliment to assume that counsel for a taxpayer must be prepared to argue every question of law involving a tax refund before the controversy comes to trial.

In this respect reference is hereby made to the case of *Wunderle v. McCaughn*, 38 Fed. Rep. (2d) 258 at 260:

"I am of the opinion that where, as in this case, the deduction of a specific item of credit claimed but subsequently disallowed by the Commissioner is the basis of the claim, a claim for refund, setting forth fully and in detail all the facts and circumstances giving

rise to the claim, is a sufficient compliance with the statute, and further, that the fact that an erroneous legal theory is presented, or, more specifically, that the deduction is claimed as a bad debt when it is really something else, does not destroy the legal sufficiency of the claim for refund. The requirement of the statute (26 USCA §156) is 'a claim for refund or credit . . . according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof . . .'. The regulations in force require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath.' In *Tucker v. Alexander*, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253, the Supreme Court said: 'The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.' "

In the case at bar, appellee's grounds for recovery in the claim for refund and in the complaint are identical, *i. e.*, in each document Mrs. Ferry contended that she was the owner of one-half of the property. The ultimate facts supporting said grounds are clearly set forth. At the most, it could be argued that the appellee failed to insert in her claim all of the evidentiary facts.

It is respectfully submitted, and examination of the voluminous records in this matter will show, that it was not the intention of Congress to compel a taxpayer to set forth in a claim for refund all the evidentiary matters.

Another important decision is the case of *U. S. v. Memphis Cotton Oil Co.*, 77 Law Ed. 613, where Judge Car-

doza gave careful consideration to questions of refund claims and said:

“The claim for refund filed with the Commissioner in June, 1927, was not subject to rejection on the score of the time of its submission. As to this the parties are agreed. Indefinite and general it was, and hence, until amended or supplemented, an inadequate compliance with the Treasury requirement that the facts relied upon in support of a claim are to be stated under oath. Beyond doubt it might have been rejected as irregular while its form was uncorrected. This is far from saying that there was the presentation of a new claim and not the perfecting of an old one when the gaps were filled thereafter.”

This Court can not assume that a widow, filing a claim for refund, will conceal a valid ground for refund and thereby incur the expense of litigation. This was well stated in the case of *Union & New Haven Trust Co. v. Eaton*, 20 Fed. (2d) 419, page 421:

“But it is urged that the specified ground for a refund of this amount was not urged in the plaintiff’s claim for refund, and that the plaintiff is therefore precluded from setting up this ground in this action. I am unable to draw any such conclusion from a study of the statute. Obviously, the statute requires nothing more than that a claim for refund be duly filed with the Commissioner of Internal Revenue. In order to induce favorable action, a claimant will assign as many grounds for such refund as he is cognizant of. It is not to be expected that a claimant will conceal a valid ground for a refund merely in order to obtain an opportunity of incurring the expenses of litigation. It is to be observed that, whether claimant assigned grounds or not, the statute merely requires that he file his claim for refund. To hold,

therefore, that a plaintiff is precluded from asserting a reason for a refund that he has not advanced in his notice of claim is to read a condition into the statute not legislated by Congress. To assert that Congress has the power to impose any condition that it sees fit to the grant of a right to sue the sovereign is true enough, but also irrelevant. The question here is: What is the condition that Congress has actually imposed?"

A substantial portion of the recovery given appellee in the judgment in this matter was based upon the exclusion from the gross estate of a portion of the life insurance upon the life of the decedent upon the ground contained in the amendment to the claim for refund. This amendment to the claim for refund was filed with the Commissioner in the form of a protest. [Vol. III, p. 953.]

The evidence adduced in the trial of the cause supports the judgment of the Court in this matter. The evidence shows that Mrs. Ferry's share of the income from the trusts, which naturally was her separate property, was deposited in joint bank accounts. [Vol. I, Tr. of Record, pp. 190, 192, 193, 194, 195, 431, 432, and 435.] The evidence further shows that all the premiums of all of said policies of insurance were paid for on checks drawn on said bank accounts. [Tr. of Record, pp. 434, 435, 799-822, both incl.]

On page 24 of appellant's brief, counsel states:

"It is also significant that appellee made no claim in the return, claim for refund, protests, or otherwise, that she was entitled to one-half of the stocks, bonds, cash, or other property standing in the name of the decedent."

This appears to interject a collateral issue into this controversy. Criticism of a taxpayer in a proceeding of this nature because she is not ruthless and does not demand every last cent that is refundable is very severe, when there was in fact no net estate. However, we think further examination of the facts will show that the probate estate received consideration by the government and counsel for the taxpayer. Attention should here be called to page 827, Vol. III, Book of Exhibits, where the following statement appears:

| | | |
|---|-------------|------------|
| "Deductions.....Total | \$14,126.18 | \$9,909.60 |
| Recommended allowable only to the extent of the value
of the gross estate Probated." | | |

In other words, no issue arises with reference to these assets because they have been absorbed by allowable deductions.

When Catherine B. Ferry, the widow, filed the required verified federal estate tax return, she incorporated therein her sworn statement in the following words:

"That it was necessary, and affiant, Catherine B. Ferry, did join in the creating of these trusts, hereinbefore set forth and in so creating these instruments received only that which was already her property pursuant to the laws of the State of California."
[Vol. II, Exhibits, p. 609.]

Such language does not mean "the laws with regard to community property." It is, therefore, appropriate to quote section 161 of the Civil Code of California, which says:

"A husband and wife may hold property as joint tenants, tenants in common or as community property."

Furthermore, in the case of *Harlow v. Standard Improvement Co.*, 145 Cal. 477 at 480, the Supreme Court of the State of California said:

“Under Section 161 of the Civil Code the husband and wife may hold property as joint tenants, tenants in common or as community property; and in the absence of any evidence of the source of the moneys with which the house was built, or of the manner in which the property was acquired there is no presumption that it was community property, or separate property of either spouse, rather than that it was held by them in joint tenancy, or as tenants in common.”

This discussion is necessary because of the presence of a parenthetical statement on page 23 of appellant's brief.

Here the writer of appellant's brief has arbitrarily added to Mrs. Ferry's previously quoted statement the following language: “(Meaning, of course, the laws with regard to community property,)”.

Mrs. Ferry and her counsel should be the best judges of what they intended the language in the estate tax return to mean. But if it is contended that this language means solely community property, then a reexamination of the previous citations will dispel any such misconception.

These citations are hereby given because it is apparent that the government is taking an entirely too narrow viewpoint with respect to the title to property involved in this estate. It is ignoring a principle consistently followed by the Treasury Department in dealing with questions of this nature and which have been stated with precision by

Mr. Justice Frankfurter in *Helvering v. Hallock*, 309 U. S. 105 at 114, Vol. 84 Law Ed. 610, where he said:

“In determining whether a taxable transfer becomes complete only at death, we look to substance, not to form.”

The principles so definitely and consistently apparent in the law of taxation were adhered to by the Trial Court.

The Trial Court had before it the question as to whether or not the appellee, taxpayer, owned a half interest in the property, which is now the corpora of the several trusts involved in this case. The government claimed that the appellee, taxpayer, did not own the property in question. The Trial Court, after considering all the evidence submitted by both sides, decided that the appellee, taxpayer, did own a half interest in the property which is now held in the trusts which are of moment in this case, and made a finding of fact to that effect, in spite of the difficulties of finding an exact terminology with which to describe the existing situation.

The irrelevancy of the niceties of terminology when a half interest actually exists which may fit into various categories is recognized by the Federal Courts and finds apt expression in the case of *Valensin v. Valensin*, 28 Fed. 599 at 601, where the Court said:

“There can be no possible doubt, upon the evidence, that the understanding and uniform practice of the parties, for several years during the entire period of their joint occupancy, was that the proceeds of the separate property of each should be regarded as common property, in which both were jointly, equally interested. The property and its proceeds were mingled with the knowledge, and apparent assent, of both. No separate account was ever kept, and no

separation of their property made. Both used it and treated it as common. Now, whether the carrying on of this business is called a technical partnership, or whether the parties, by mutual agreement and unvaried practice, during all the time they lived together on the lands, put the proceeds of the property, and of its management, into a common pool and were by mutual understanding co-owners and joint tenants, or tenants in common, can make no difference as to a recovery in this action. If not technically a partnership, it is essentially one."

And on page 602:

"That the wife is competent to enter into such arrangement with her husband, respecting his and her separate property, and the proceeds thereof, as clearly appeared to have existed in this case, seems unquestionable, under our Code. 'Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried.' Civil Code, §158; *Alexander v. Bouton*, 55 Cal. 19."

Due consideration must also be given to the fact that the transactions between Mr. and Mrs. Ferry had their inception many years ago and were between a husband and wife. Such arrangements were informal and lacked the precision present when strangers contract. The courts recognize the wide latitude of evidence applicable to situations of this nature. See *Perkins v. Sunset Tel. and Tel. Co.*, 155 Cal. 720, where the Court said:

"It will be seen by an examination of the authorities cited above that the utmost freedom of contract exists in California between husband and wife and that the courts will resort to circumstantial evidence furnished by the general conduct of the spouses with reference to their property in determining the existence

or non-existence of a contract where the exact terms of the alleged agreement have escaped the memory of one or both of the parties to it. In the case at bar there was both positive evidence and also testimony as to facts and circumstances tending to show that the contract, whereby the husband remitted to his wife all his interest in that which would ordinarily have been community property, was, and had been in existence for a long period of years. The findings upon that subject were supported by the evidence."

V.

Relative to the Taxation of the Trusts, the Grounds Upon Which the Judgment Was Based Were Considered by the Commissioner, as Evidenced by His Admission.

The Pre-Trial Brief which was received in evidence in this matter [Record, p. 442] contains the following statement by the government as to the grounds and contentions of appellee before the Commissioner on the matter of her ownership of one-half of the properties that went into the trusts. In said Pre-Trial Brief it is stated [Record, p. 837]:

"Before the Commissioner, plaintiff contended that for tax purposes an undivided half of the properties placed in the trusts was originally owned by her, but never presented to the Commissioner *sufficient evidence* to establish such fact. What evidence plaintiff will produce at the trial to support such factual contention is at this time unknown to the defendant."
(Italics supplied.)

It is to be noted that the drafter of this Pre-Trial Brief, E. H. Mitchell, Esq., Counsel for the government, was present in Court during the entire trial of this matter,

yet no attempt was made to introduce evidence at variance with said statement in the Pre-Trial Brief or to show that said representation of fact in said Pre-Trial Brief was false and unfounded.

In acting upon a claim for refund the Commissioner is bound by the grounds he considers.

See *Union Trust Co. of Pittsburgh, et al. v. McCaughn*, 24 Fed. (2d) 459; 6 A. F. T. R. 7325.

Conclusion.

The appellee, taxpayer, therefore respectfully submits:

1. That there is no variance between the facts and the grounds which she stated in her Claim for Refund and the facts and the ground which she stated in her Complaint in the District Court;
2. The Commissioner of Internal Revenue was consistently and in various ways advised of the bases of the contentions made by the appellee, taxpayer;
3. The Judgment of the District Court was properly predicated upon the evidence presented at the trial; and
4. That the Findings of Fact, as made by the Trial Court, and the Conclusions of Law, as reached by the Trial Court, were properly made and reached.

It is, therefore, submitted that the judgment of the Trial Court in this case should be affirmed.

Respectfully submitted,

CLAUDE I. PARKER,
RALPH W. SMITH,
JOHN MOORE ROBINSON,

Counsel for Appellee.

No. 10954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Appellant,

VS.

ROBERT CUMMINGS,

Appellee.

VOLUME I.

(Pages 1 to 272, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUN 15 1945

PAUL P. O'BRIEN,
CLERK

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JOSEPH J. CUMMINS
739 South Hope St.
Los Angeles 14, Calif. [1*]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 488314

ROBERT CUMMINGS,

Plaintiff,

v.

UNIVERSAL PICTURES COMPANY, INC. a
corporation,

Defendant.

COMPLAINT FOR DECLARATORY AND OTHER
RELIEF

Plaintiff complains of defendant and alleges:

I.

Defendant is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is now, and was at all times hereinafter mentioned, qualified to do business in the State of California, with its principal office for the transaction of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

On or about November 21, 1938, plaintiff and defendant entered into a written contract, a copy of which, as originally executed, is annexed hereto marked Exhibit "A" and by reference made a part hereof. Since November 21, 1938, said contract has at various and sundry times been amended by the parties. Said amendments are not, nor are any of them, pertinent [2] to the controversy

herein alleged and for that reason are not pleaded herein. Said contract (hereinafter referred to as "the contract" or "said contract") was at all times from November 21, 1938 to and including May 29, 1943, subsisting between said parties. The present controversy arises by reason of the fact that defendant contends that said contract still exists between the parties and plaintiff contends that it was terminated on May 29, 1943. Said controversy arises out of the facts hereinafter alleged.

III.

On or about April 10, 1943, defendant demanded of plaintiff that plaintiff portray the role of "Hank" in a photoplay then entitled "Fired Wife." Plaintiff refused to and did not comply with said demand. Thereafter, on April 15, 1943, defendant served a written notice upon plaintiff placing said plaintiff upon suspension. Said notice is as follows, to-wit:

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

April 15, 1943

Registered Mail

Mr. Robert Cummings

14111 Sherman Way

Van Nuys, California

Dear Mr. Cummings:

This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your contract of employment with us dated November 21, 1938, as heretofore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943 in accordance with our notice

to you [3] dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect.

At the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to-wit: the role of 'Hank' in the photoplay now entitled 'Fired Wife.' By reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
epw:vv

By Edward Muhl
Assistant Secretary"

IV.

The role of "Hank" in the photoplay then entitled "Fired Wife" was completed by the person who had been substituted for plaintiff to portray such role on or prior to May 18, 1943. [4]

V.

On May 18, 1943, defendant served a second written notice upon plaintiff advising plaintiff that by reason of his refusal to play the role of "Hank," and his suspension as a consequence of said refusal, that the term of said contract had been extended for a period of five weeks and two days commencing April 12, 1943, and advising plaintiff that he was being further suspended. Said written notice is as follows, to-wit:

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

May 18, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

9441 Wilshire Boulevard,

Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing April 12, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the con- [5] tinuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
jab/j

By Edward Muhl
Assistant Secretary"

VI.

Between the dates of April 10, 1943, and May 18, 1943, both inclusive, plaintiff received no notices of any kind or nature from defendant other than the two above pleaded. No demand, oral or written, was made by defendant at any time after April 10, 1943 that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract.

VII.

On May 26, 1943, plaintiff, pursuant to the terms and provisions of said contract, appeared at the offices of the defendant and demanded of defendant payment of salary as fixed by said contract for that portion of the week beginning May 19, 1943 and ending May 22, 1943. Plaintiff alleges that Exhibit "A" provides that the pay-

piration of said period because of my purported failure, refusal and/or neglect to perform my obligations thereunder. As you are well aware, there has been no failure, refusal and/or neglect of my part to perform my obligations under said contract [7] at any time since the expiration of said period of 5 weeks and 2 days, assuming, without admitting, that there was such a failure with respect to said period of 5 weeks and 2 days. Assuming that you had the right of suspension for said period of 5 weeks and 2 days, such suspension would have ended on May 18, 1943. Accordingly, compensation was payable to me under said contract for the period after May 18, 1943. On May 26, 1943, (on which date compensation under said contract was payable to me), at or about 2:30 P. M., demand was made upon you for the payment of the compensation due and payable on said date.

At said time, you failed and refused to pay me the compensation which was due and payable under said contract. Such failure and refusal was a material breach by you of your obligations under said contract and I hereby notify you that I elect to and do hereby terminate said contract by reason of such failure and refusal.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which I may have in the premises, all such other rights and/or remedies being expressly reserved by me.

ROBERT CUMMINGS"

IX.

Thereafter, on June 2, 1943, defendant advised plaintiff in writing that it did not consider said contract terminated and that it did not consider that there had been any breach of said contract. Said notice from defendant to plain- [8] tiff, being as follows, to-wit:

“UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

June 2, 1943

Registered Mail

Mr. Robert Cummings

c/o Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

This is to acknowledge receipt of your telegram of June 1, 1943.

Please be advised that despite your purported termination of your contract with us, dated November 21, 1938, we will continue to treat and consider said contract as being in full force and effect.

In our notice to you under date of May 18, 1943, we notified you that your employment under said contract, as amended, would be further suspended during the continuance of your failure, refusal and/or neglect to perform your obligations thereunder.

At no time since April 12, 1943, up to and including the present time, have you notified us of your willingness to perform pursuant to the terms of said contract, as amended. If you are willing to resume

your services under said contract, as amended, please notify Mr. Muhl at our studio, and upon your reporting pursuant to such notification, we will terminate the suspension of your employment. [9] Failing such notification by you, your employment will continue in suspension during the continuance of your present failure, refusal and/or neglect to perform your obligations under said contract, as amended, and until you do report ready to resume and perform your services under said contract, as amended.

We reserve the right to extend your employment under said contract, as amended, for a period equivalent to the period of such suspension, and this notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
jab/j

By Edward Muhl
Assistant Secretary"

X.

Since May 29, 1943, there has been an interchange of notices and letters from defendant to plaintiff and from plaintiff to defendant, the purport of which is that defendant claims that said contract is still existing and subsisting between plaintiff and defendant, and plaintiff claims that said contract by reason of the material breach of defendant, as herein alleged, has been terminated by plaintiff, as of May 29, 1943, and no longer exists between them.

XI.

Plaintiff asserts that by reason of the matters and things herein alleged that an actual controversy exists between said parties and that it is necessary that the Court declare the rights of said parties growing out of the controversy herein alleged and determine whether or not said contract was terminated as of May 29, 1943, as plaintiff contends, or whether or not said contract is still subsisting and valid, as defendant contends.

And for a Second and Separate Cause of Action Plaintiff Alleges:

I.

Plaintiff hereby repeats, re-alleges and re-pleads the allegations contained in Paragraphs I to VII, both inclusive, of its first cause of action, as if fully set out herein at length.

II.

Pursuant to the terms of said contract, defendant is indebted to plaintiff for salary and compensation earned by plaintiff for that portion of the week beginning May 19, 1943 and ending May 22, 1943, both dates inclusive, and for the week beginning May 24, 1943 and ending May 29, 1943, both dates inclusive, in the sum of \$2,500.00.

III.

Plaintiff has heretofore made demand, and hereby makes demand of defendant for the payment of said \$2,500.00, and defendant has failed, refused and neglected to pay the same, or any part thereof, and the same has not, or any part thereof, been paid.

And for a Third and Separate Cause of Action, Plaintiff Alleges:

I.

Plaintiff hereby repeats, re-alleges and re-pleads, the allegations contained in Paragraphs I and II of its [11] first cause of action, as fully as if set out herein at length.

II.

Commencing with the period of approximately one year after the date of the execution of said contract between plaintiff and defendant, defendant has deliberately with malice and in bad faith embarked upon a course of action in respect of plaintiff for the purpose of using plaintiff in minor roles, and such roles as would discredit plaintiff and imperil his future, and roles which were out of character and not consistent with the abilities and talents of plaintiff and has on numerous and sundry occasions, too numerous to mention, unreasonably demanded of plaintiff that plaintiff portray roles for which he was unsuited and which would discredit plaintiff and impair his standing as an actor and has demanded of plaintiff that he render his services in photoplays which would discredit plaintiff and impair his standing as an actor, all for the sole purpose of discrediting plaintiff with the end in view of depreciating plaintiff's abilities and talents as an actor and of destroying his potential future as an actor. In this regard, plaintiff specifically alleges that the executive officers of defendant have on various and sundry occasions advised plaintiff that he was a "son-of-a-bitch" and that "they would run him ragged," and that he was a "bastard" and they "would teach him a lesson."

III.

Plaintiff entered into said contract with defendant in good faith and upon the fundamental representations made by defendant and implicit in said contract and every covenant and condition thereof, that defendant would be reasonable in its judgment affecting the use of plaintiff's services and that the defendant would exercise good faith in the use of plaintiff's services and would utilize the talents and abilities of plaintiff to their best advantage and for the mutual advantage and benefit [12] of plaintiff and defendant. Defendant has been on the contrary unreasonable in its demands upon plaintiff for the rendition of his services and has wholly failed to exercise good faith and reasonableness in its purported performance of said contract continuously from approximately one year after the date of the execution of said contract to April 10, 1943, and on the contrary has since the execution of said contract with calculation and design, in bad faith and with malice, unreasonably exploited the services of plaintiff for the sole purpose of mis-using his talents and abilities and destroying plaintiff's future as an actor.

IV.

By reason of the matters and things alleged in this third cause of action, a controversy has arisen between plaintiff and defendant as to the existence of said contract. Plaintiff asserts that the unreasonable demands of defendant herein alleged constitute material breaches of said contract and that by reason thereof plaintiff has the right to terminate said contract.

Defendant asserts that there have been no breaches of said contract and that even though breaches have occurred as herein alleged said breaches are not material

breaches and that plaintiff has no right to terminate said contract.

And for a Fourth Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff hereby repeats, re-alleges and re-pleads the allegations contained in Paragraphs I to XI, both inclusive, of his first cause of action and allegations contained in Paragraphs II to IV, both inclusive, of its third cause of action, as if fully set out herein at length.

II.

Prior to April 10, 1943, defendant advised plaintiff that it desired to utilize the services of plaintiff to portray the role of "Hank" in a photoplay then entitled "Fired Wife." Plaintiff at said time advised defendant that he would not render his services in said role of "Hank" in said photoplay for the reason that the part and the photoplay were not consonant with plaintiff's standing as an actor in the motion picture industry and that the said demand of defendant was unreasonable. Defendant agreed with the objections of plaintiff, as herein alleged, but stated to plaintiff that defendant expected to make said photoplay as a "Class A" picture and would implement and supplement the story by means of direction and personnel which were then available to defendant. Defendant at said time specifically represented to plaintiff that if plaintiff would agree to portray the role of "Hank" in said photoplay that said photoplay would be directed by an outstanding director in the motion picture industry comparable to Leo McCarey. Plaintiff alleges that Leo McCarey has been for many years and is now recognized as one of the outstanding directors

in the motion picture industry. Defendant at said time further represented to plaintiff that the other leading role in said photoplay would be portrayed by Teresa Wright and that other principal parts in said photoplay would be portrayed by Charles Coburn and Eddie "Rochester" Anderson, all of whom are outstanding performers in the motion picture industry.

Based upon said representations, and each of them, plaintiff agreed with defendant that its demand was reasonable and advised defendant that he would portray said role of "Hank" in said photoplay. On or about April 10, 1943 defendant advised plaintiff that said photoplay was to be directed by Charles Lamont and that Teresa Wright, Charles Coburn and Eddie "Rochester" Anderson would not be included in the cast of said photoplay. Plaintiff alleges that at no time prior to April 10, 1943 was [14] Charles Lamont, nor has he ever been at any time since, recognized as an outstanding director or as a director comparable to Leo McCarey. Plaintiff immediately upon receipt of said information from defendant did then and there notify defendant that he would not render his services in connection with the role of "Hank" in said photoplay but plaintiff did at the same time advise defendant that if defendant complied with the representations made by defendant as herein alleged, plaintiff would be ready, willing and able to render his services in said photoplay and would portray the role of "Hank" in said photoplay.

Plaintiff is informed and believes and upon said information and belief alleges that the principal photography on said photoplay was commenced on or about April 12, 1943 and was completed upon the expiration of five (5) weeks and two (2) days from said date. Plaintiff

alleges directly that Leo McCarey did not direct said photoplay nor did any other person recognized as an outstanding director in the motion picture industry, or as a director comparable to Leo McCarey, direct said photoplay. Teresa Wright, Charles Coburn, and Eddie "Rochester" Anderson did not, nor did any of them, portray or play any of the roles in said photoplay.

III.

Since May 18, 1943, several written notices have been transmitted from defendant to plaintiff. Defendant in said written notices further purports to suspend plaintiff, setting forth as the reason therefor the purported failure of plaintiff to comply with the demand of defendant to portray the role of "Hank" in the photoplay "Fired Wife" as alleged in Paragraph II hereof, and defendant asserts in its said written notices that as a consequence of said purported failure of plaintiff that defendant has the right to and has placed plaintiff upon continuing suspension, and has the right to and has extended the [15] term of said contract for the period of said continuing suspension.

Plaintiff alleges that he was ready, able, and willing to render his services to defendant in accordance with the terms of said contract at all times from April 10, 1943 to and including May 29, 1943, on which last mentioned date plaintiff voluntarily terminated said contract for the reasons alleged in the first cause of action pleaded herein.

IV.

By reason of the matters and things herein alleged an actual controversy exists between said parties. Plaintiff asserts that he has not breached said contract in any particular and that defendant had no right to place plain-

tiff upon suspension as it purports to have done by its notice of May 18, 1943, or for any length of time whatsoever, and further that defendant has no right to purport to extend said contract for the period of said purported extensions, or any of them.

Defendant asserts that plaintiff has breached said contract and that defendant was within its rights in purporting to suspend plaintiff, as set forth in its letter dated May 18, 1943, and is within its right to place plaintiff upon continuing suspension and to keep plaintiff upon continuing suspension, as alleged in Paragraph III hereof, until plaintiff reports back to defendant **ready**, able and willing to render his services in such capacity as defendant may direct, and further that defendant has the right to extend said contract for the period of all of said purported suspensions.

Plaintiff asserts that he was at all times since April 10, 1943 to and including May 29, 1943, ready, able and willing to render his services pursuant to the terms of said contract.

Defendant asserts that plaintiff was not ready, [16] able or willing to render services to defendant as required by said contract at any time after April 10, 1943.

Plaintiff asserts that said contract was at all times in full force and effect prior to April 10, 1943 and from April 10, 1943 to and including May 18, 1943, and that pursuant to the terms of said contract plaintiff was entitled to salary in the sum of \$1,500.00 per week as provided by said contract. Plaintiff alleges in this regard that from April 12, 1943 to and including May 18, 1943, salary due and owing to plaintiff from defendant amounted to the sum of \$7,750.00, no part of which has been paid.

Defendant asserts that by reason of the purported suspension of said contract by defendant, by its notice of

May 18, 1943 as herein alleged, defendant was not under any obligation to pay to plaintiff salary as required by said contract from April 12, 1943 to and including May 18, 1943.

Plaintiff asserts that defendant by its notice of May 18, 1943 and its subsequent notices as herein alleged purporting to suspend plaintiff and extend said contract, its persistent refusal and omission to pay to plaintiff compensation due to plaintiff from April 12, 1943 to May 18, 1943, both dates inclusive, its persistent refusal and its failure to pay to plaintiff compensation from May 19, 1943 to May 29, 1943, both dates inclusive, and defendant's unreasonable demands upon plaintiff constitute material breaches of said contract, as a consequence of which plaintiff has the right to terminate said contract.

Defendant denies that its conduct in respect of said breaches, or any of them, gives to plaintiff the right to terminate said contract.

Plaintiff asserts that by reason of the breaches herein alleged that a material part of the consideration of said [17] contract has failed, and that as a consequence of said material failure of consideration plaintiff has the right to rescind said contract and that said contract should be rescinded. In this connection, plaintiff alleges that plaintiff has received nothing of value under said contract from defendant other than reasonable compensation for services already rendered and that there is nothing to return or offer to return to defendant. Plaintiff, however, does hereby offer to do and perform any and all things in connection with a rescission of said contract which to the court may seem just and equitable as conditions precedent to a rescission thereof.

Defendant asserts that said alleged breaches do not constitute a material failure of consideration and that

plaintiff has no right to rescind said contract and that no rescission of said contract should be decreed.

Wherefore, plaintiff prays judgment as follows:

(1) That the contract dated November 21, 1938, as amended, be declared by the court to have been terminated by defendant on May 29, 1943, that since May 29, 1943 said contract has been terminated, and that said parties have no contractual rights or duties each to the other by virtue of said contract, as amended, since May 29, 1943.

(2) Said contract be declared terminated and at an end, by reason of the unreasonable demands and bad faith of defendant in its alleged performance of said contract, and that it be declared that said parties have no contractual rights or duties one to the other from the date of the judgment herein.

(3) That the court declare a rescission of said contract by reason of a material failure of consideration on such terms if any, as to the court may seem just and equitable. [18]

(4) For the sum of \$2,500.00 compensation or salary due from defendant to plaintiff from May 19, 1943 to May 22, 1943, both dates inclusive.

(5) For the sum of \$7,750.00 compensation or salary due from defendant to plaintiff from April 12, 1943 to May 18, 1943, both dates inclusive.

(6) Cost of suit and such other and further relief as to the court may seem meet and proper in the premises.

ROTH AND BRANNEN and
JOSEPH J. CUMMINS

By Lester Wm. Roth

Attorneys for Plaintiff [19]

EXHIBIT "A"

November 21, 1938

Universal Pictures Company, Inc.

Universal City, California

Gentlemen:

This will confirm the following agreement between us:

(1) Concurrently with the execution hereof you have entered into an agreement with me for my services in your photoplay now entitled "Three Smart Girls Grow Up." As a material part of the consideration inducing you to enter into said agreement executed concurrently herewith I hereby give and grant to you the right or option to engage me to render my services for you upon the terms, covenants and conditions set forth in that certain contract hereunto attached, which contract is hereby referred to and by this reference made a part hereof.

(2) The foregoing option may be exercised by you at any time up to and including the expiration of thirty (30) days after the first public preview of said photoplay now entitled "Three Smart Girls Grow Up" or at any time up to and including, but not later than, two (2) days after the date of delivery at your New York office of the first print of said completed photoplay, whichever is earlier. Notwithstanding the foregoing, it is agreed that if for any reason you do not use or require my services in connection with said photoplay "Three Smart Girls Grow Up," the foregoing option shall not lapse or terminate but shall remain in full force and effect and in such case said option may be exercised by you at any time prior to the expiration of thirty (30) days after the payment to me of the minimum guarantee specified in

paragraph 6 of my contract with you executed concurrently herewith, relating to said photoplay "Three Smart Girls Grow Up." Notice of the exercise of said option shall be in writing and may be served upon me by depositing such notice in the United States mail addressed to me c/o Stanley Bergerman & Company, 9165 Sunset Boulevard, West Hollywood, California, or at such other address as I may from time to time indicate in writing, or if you so desire, such notice may be served by telegraph, addressed to be as aforesaid, or by personal delivery. The date of the deposit of such notice in the United States mail or the date of the delivery of the same by you to the telegraph company or the date of personal delivery, as the case may be, shall be the date of the service of such notice.

(3) I have affixed my signature to the contract hereto attached. In the event you exercise the option herein granted to you, my signature to said contract shall be final and effective and said contract shall be and constitute a final and binding agreement between us, but should you not exercise the option herein granted to you, then my signature to said contract shall be of no effect.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Yours very truly,

(signed) ROBERT CUMMINGS

Approved and accepted;
universal pictures company, inc.

by: (signed) CLIFF WORK
Vice President

And: (signed) EDWARD MUHL
Assistant Secretary [20]

UNIVERSAL PICTURES COMPANY, INC.

Agreement executed at Universal City, California, November 21, 1938, by and between Universal Pictures Company, Inc., a Delaware corporation, hereinafter referred to as the "producer", and Robert Cummings, hereinafter referred to as the "artist",

Witnesseth:

For and in consideration of the covenants, conditions and agreements hereinafter contained and set forth, the parties hereto have agreed and do hereby agree as follows:

1. The producer hereby employs the artist to render his exclusive services as herein required for and during the term of this agreement and the artist hereby accepts such employment and agrees to keep and perform all of the duties, obligations and agreements assumed and entered into by him hereunder.

2. The artist agrees that throughout the term hereof he will render the services hereinafter specified, solely and exclusively for and as requested by the producer; that he will render his services as an actor in such roles and in such photoplays and/or other productions as the producer may designate; that he will make personal appearances in motion picture theatres and/or other places of entertainment and/or will render his services as an actor in vaudeville, plays and/or in all other kinds of performances on the speaking stage; that he will render his services as a radio performer, not only by broadcasting in person, but also by making electrical transcriptions and/or by any other present or future methods or means; that he will render his services as an actor in television productions; and that he will render his services in con-

nection with the broadcasting and/or transmission of his likeness and/or voice by means of television, radio and/or otherwise, whether such broadcasting and/or transmission be either directly or indirectly in connection with or independent of photoplays. The artist further agrees that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection with the services to be performed by the artist hereunder; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer. The term "photoplays" as used in this agreement shall be deemed to include, but not be limited to, motion picture productions produced and/or exhibited and/or transmitted with sound and voice recording, reproducing and/or transmitting devices, television, radio devices and all other improvements and devices which are now or hereafter may be used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture productions.

3. The artist further agrees that during the term hereof he will not render his services as an actor, or pose, act, appear, write, direct or render any other services in any way connected with motion pictures or photoplays, nor will he render any services of any kind or character whatsoever, in any way connected with dramatic, theatrical, musical, vaudeville, radio, television or other productions, shows, performances and/or entertainment, nor will he render any other similar services to or for himself, or to or for any other person, firm or corporation other than the producer, without the written consent of the producer first had and obtained. The artist further agrees that

he will not consent to nor permit any other person to advertise, announce or make known, directly or indirectly, by paid advertisements, press notices, or otherwise, that he has contracted to do or perform any act or services contrary to the terms of this agreement. The producer shall have the right to institute any legal proceedings, in the name of the artist or otherwise, to prevent such acts, or any of them.

4. The artist expressly gives and grants to the producer the sole and exclusive right to photograph and/or otherwise reproduce any and all of his acts, poses, plays and appearances of any and all kinds during the term hereof, and to record his voice and all instrumental, musical and other sound effects produced by him, and to reproduce and/or transmit the same, either separately or in conjunction with such acts, poses, plays and appearances, as the producer may desire; and further gives and grants to the producer solely and exclusively all rights of every kind and character whatsoever in and to the same, or any of them, perpetually, including as well the perpetual right to use the name of the artist and pictures or other reproductions of the artist's physical likeness, and recordings and reproductions of the artist's voice, in connection with the advertising and exploitation thereof, as well as in connection with the advertising and/or exploitation of any other services which may be required of the artist hereunder. The producer shall have the right to "dub" the voice of the artist and all instrumental, musical and/or other sound effects to be produced by the artist to such extent as may be desired by the producer, such dubbing of the artist's voice to be in English and/or in any other language or languages designated or desired by the producer. The producer shall also have the right to use a "double" for the acts,

poses, plays and appearances of the artist to such extent as may be desired by the producer. The artist does also hereby grant to the producer, during the term hereof, the sole and exclusive right to make use of, and to allow others to make use of, his name for advertising, commercial and/or publicity purposes (other than in connection with the acts, poses, plays and appearances of the artist hereunder), as well as the sole and exclusive right to make use of and distribute, and to allow others to make use of and distribute, his pictures, photographs or other reproductions of his physical likeness and of his voice for like purposes. The artist shall at no time during said term grant the right to, authorize or willingly permit any person, firm or corporation other than the producer to make use of his name or to make use of or distribute his pictures, photographs or other reproductions of his physical likeness or of his voice, and authorizes the producer, in the name of the artist or otherwise, to institute any proper legal proceedings to prevent such acts, or any of them.

5. The artist agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

6. The artist hereby expressly gives and grants to the producer the right to lend the services of the artist to any other person or persons, in any capacity in which the artist is required to rendered his services hereunder, upon the distinct understanding and condition, however, that

this contract shall, nevertheless, continue in full force and effect and that the artist shall not be required to do any act or perform any services contrary to the provisions of this agreement. Any breach by any such person, however, of any of the terms of this [21] agreement shall not constitute a breach by the producer of its obligations or covenants under this agreement, nor shall the artist have the right to terminate this agreement by reason of any such breach by any such person, but the artist, at his option, in the event of such breach by any such person, shall be released from the obligation to render further services to such person. In the event that the artist is required to render services for any other person or persons as hereinabove provided, he agrees to render the same to the best of his ability. Should the services of the artist be loaned to any other person or persons hereunder, such other person or persons, at the option of the producer, shall be entitled to all or any of the advertising and other rights in connection with services rendered by the artist for such other person or persons as are given to the producer under the terms of this agreement.

Rider to Paragraph 6

It is understood and agreed that the right granted to the producer under the provisions of this paragraph 6 shall be limited to the right to lend the services of the artist to any so-called "major" producer of photoplays or to any so-called "independent" producer whose photoplays are released or distributed by or through a "major" releasing or distributing organization.

7. In the event that the producer desires, at any time or from time to time, to apply, in its own name, or otherwise, but at its own expense, for life, health, accident or other insurance covering the artist, the artist agrees that

the producer may do so and may take out such insurance for any sum which the producer may deem necessary to protect its interests hereunder. The artist shall have no right, title or interest in or to such insurance, but agrees, nevertheless, to assist the producer in procuring the same by submitting to the usual and customary medical and other examinations and by signing such applications and other instruments in writing as may reasonably be required by such insurance company or companies.

8. In the event that by reason of mental or physical disability, or otherwise, the artist shall be incapacitated from fully performing the terms hereof or complying with each and all of his obligations hereunder, or in the event that he suffer any facial or physical disfigurement materially detracting from his appearance on the screen or interfering with his ability to perform properly his required services hereunder, or in the event that his present facial or physical appearance be materially altered or changed, or in the event that he suffer any impairment of his voice, then in either or any of said events this agreement shall be suspended during the period of such disability or incapacity or facial or physical disfigurement or change of present facial or physical appearance, or impairment of voice, and no compensation need be paid the artist during the period of such suspension. The term of this agreement, and all of its provisions herein contained, may be extended, at the option of the producer, for a period equivalent to all or any part of the period of such suspension. The producer, at its option, in the event of the continuance of such disability or incapacity or facial or physical disfigurement or change of present facial or physical appearance or impairment of voice for a period or aggregate of periods in excess of three (3) weeks during the term hereof, may cancel and terminate

this employment. The producer shall have the right, at its option, to have medical examinations of the artist made at any time and from time to time by such physician or physicians as the producer may designate.

9. In the event that at any time during the term hereof of the producer, or any person to whom the services of the artist are loaned by the producer hereunder, should be materially hampered, interrupted or interfered with in the preparation, production or completion of photoplays by reason of any fire, casualty, lockout, strike, labor conditions, unavoidable accident, riot, war, act of God, or by the enactment of any municipal, state or federal ordinance or law, or by the issuance of any executive or judicial order or decree, whether municipal, state or federal, or by any other legally constituted authority, or by any national or local emergency or condition, or by any other cause of the same or any similar kind or character, or if by reason of the illness or incapacity of any principal member of the cast (other than the artist) or of the director of any photoplay in which the artist is rendering or is scheduled to render services, the production of such photoplay is suspended, interrupted or postponed, or if for any reason whatsoever the majority of the motion picture theatres in the United States shall be closed for a week or any period in excess of a week, then and in any of said events this agreement, at the option of the producer, may be suspended, likewise during the continuance of such event or events, and no compensation need be paid the artist during the period of such suspension; and the term of this agreement, at the option of the producer, may be continued and extended, upon the same terms and conditions as shall then be operative hereunder, for a period equivalent to all or any part of any period or periods during which any such event or

events shall continue. If such suspension or suspensions should continue for a period or aggregate of periods in excess of twelve (12) weeks during the term hereof, then and in that event either the artist or the producer, at his or its option, may elect to terminate the artist's employment hereunder; provided, however, that should the artist desire to elect to terminate his employment he shall serve notice of such desire upon the producer, and if the producer should not resume the payment of the weekly compensation hereinafter specified, commencing as of not later than one (1) week after the receipt of such notice from the artist, then and in that event the employment of the artist hereunder shall be terminated. If the producer should resume the payment of such compensation, commencing as of not later than one (1) week after the receipt of such notice, then and in that event the employment of the artist hereunder shall not be terminated, but shall continue in full force and effect.

10. The artist warrants and represents to the producer and agrees that the artist is and shall be a member in good standing of Screen Actors Guild, Inc., and will remain so for the duration of this contract.

11. Notwithstanding anything elsewhere contained herein, it is expressly agreed that if at the time of the expiration of this agreement the artist is engaged in a photoplay or photoplays or in the rendition of any of his other required services hereunder, and if the producer shall not then have exercised an option for the further services of the artist for a further period, then and in that event the artist's employment hereunder, at the option of the producer, may be continued and extended, at the same rate of salary and upon the same conditions as shall be operative hereunder immediately prior to the time of such expiration, until the completion of such

of the artist's required services hereunder as the producer may desire in connection therewith, not exceeding sixty (60) days. If, after the expiration of this employment, the producer should desire the services of the artist in making retakes, added scenes, sound track or any change or changes in any photoplay in which the artist shall have appeared during his employment hereunder, then and in either of said events the artist agrees to render such services in connection therewith as and when the producer may request, unless the artist is otherwise employed, but if otherwise employed the artist will cooperate to the fullest extent in the making of such retakes, added scenes, sound track and/or changes, and for services actually rendered in the making thereof the artist shall be paid at the same rate of compensation as the artist was receiving immediately prior to the expiration of this employment, except that such compensation shall be paid only for the days on which the artist is actually so employed.

12. It is distinctly understood and agreed by and between the parties hereto that the services to be rendered by the artist under the terms hereof, and the rights and privileges granted to the producer by the artist under the terms hereof, are of a special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, [22] and that a breach by the artist of any of the provisions contained in this agreement will cause the producer irreparable injury and damage. The artist hereby expressly agrees that the producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the artist. Resort to injunctive and other equitable relief, however, shall not be construed

as a waiver of any other rights that the producer may have in the premises, for damages or otherwise. In the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, shall have the right to cancel and terminate this employment, may refuse to pay the artist any compensation during the period of such failure, refusal or neglect on the part of the artist, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, or shall have been directed to render any other of his required services hereunder, then and in either of said events the producer shall have the right to refuse to pay the artist any compensation during the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof. Should the producer notify the artist that the artist has been cast to portray a role in a photoplay or to perform any other of his required services hereunder, and should the artist thereupon or at any time prior to the designated date of commencement of the rendition of such services advise the producer that the artist does not intend to render such services, the producer shall thereupon or at any time

thereafter have the right to refuse to pay the artist any compensation commencing as of the date on which the artist has so advised the producer of his intent not to perform, or, at the producer's election, as of any time thereafter, and continuing until the expiration of the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or of such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof. Any period during which the producer is entitled to refuse to pay compensation to the artist pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the artist shall be requested by the producer to and shall render other services hereunder. The producer shall also have the right, at its option, to extend the term of this agreement and all of its provisions for a period of time equivalent to all or any part of any leave or leaves of absence granted the artist by the producer during the term hereof. Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or priority allowed by law. All options granted to the producer herein for extending the term of this agreement, other than the options hereinafter in paragraph 23 specifically set forth, may be exercised by the producer by notice in writing to be served upon the artist at any time prior to the expiration of the term hereof.

13. If this agreement be suspended or if the producer refuse to pay the artist compensation, pursuant to any right to do so herein granted to the producer, or if the producer grant any leave of absence to the artist, and if in connection with such suspension, refusal to pay or leave of absence, the producer shall exercise the right to extend this agreement for a period equivalent to all or any part of the period of such suspension, refusal to pay or leave of absence, then and in that event the running of the then current term or period of the artist's employment hereunder shall be deemed to be interrupted during the period of such suspension, refusal to pay or leave of absence, but shall be resumed immediately upon the expiration of such suspension or leave of absence or (in case of any such refusal to pay) upon the resumption of the payment of compensation, and (subject to subsequent extension or termination for proper cause) shall continue from and after the date of such resumption for a period equal to the unexpired portion of such term or period at the time of the commencement of such suspension, refusal to pay or leave of absence, less a period equal to that portion, if any, of the period of such suspension, refusal to pay or leave of absence, for which the producer does not exercise the right to extend this agreement. In the event of any such extension the dates for the exercise of any subsequent options and the dates of the commencement of any subsequent optional period or periods of employment hereunder shall be postponed accordingly. During the period of any such suspension, refusal to pay or leave of absence the artist shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained. Should the producer pay any money or compensation to the artist for or dur-

ing all or any part of any period in which this agreement is suspended, or in which the artist is not entitled to compensation, or in which the producer is entitled to refuse to pay compensation to the artist, then and in that event, at the option of the producer, the money and/or compensation so paid the artist shall be returned by the artist to the producer on demand, or the same may be deducted by the producer from any compensation earned hereunder by the artist after such period, but this provision shall not be deemed to limit or exclude any other rights of credit or recovery, or any other remedies, the producer otherwise may have. Wherever in this agreement reference is made to the phrases "the term hereof", "the term of this agreement", or other phrases of like tenor, such reference (unless a different meaning clearly appears from the context) shall mean and be deemed to refer to the original period of the artist's employment hereunder and/or to whichever of the optional periods of employment provided for in paragraph 23 hereof may be current at the time referred to.

14. No waiver by the producer of any breach of any covenant or provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.

15. All notices which the producer is required or may desire to serve upon the artist under or in connection with this agreement may be served by addressing the same to the artist at such address as may be designated from time to time in writing by the artist, or if no such address be designated in writing by the artist, or, if having designated an address, the artist cancels the same and fails to designate a new address, then by addressing the same to the artist at any place where the producer has a studio

or an office and, in any case, by depositing the same so addressed, postage prepaid, in the United States mail, or by sending the same so addressed by telegraph or cable, or, at its option, the producer may deliver the same to the artist personally, either in writing or, unless otherwise specified herein, orally. If the producer elect to mail such notice or to send the same by telegraph or cable, then the date of mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice.

16. Nothing in this contract contained shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this agreement and any material statute, [23] law or ordinance contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the provision of this agreement affected shall be curtailed and limited only to the extent necessary to bring it within the legal requirements.

producer

17. The agrees to furnish all modern wardrobe and wearing apparel necessary for any and all roles to be portrayed by the artist hereunder; it being agreed, however, that should so-called "character" or "period" costumes be required the producer shall supply the same. It is distinctly understood and agreed, however, that in no event shall the producer be required to furnish shoes, hosiery, or underclothing for the artist; but the artist shall supply at his own expense all shoes, hosiery and underclothing (other than "character" or "period" shoes, hosiery or underclothing) necessary for any and all roles to be portrayed by him hereunder. All costumes, apparel, and other articles furnished or paid for by the producer

pursuant to the terms of this agreement, or otherwise, shall be and remain the property of the producer and shall be returned promptly to it.

18. The services of the artist hereunder are to be rendered at such place or places as may from time to time be designated by the producer. When the artist is required to render his services on location the producer agrees to furnish such necessary and reasonable meals and transportation as may reasonably be required for the artist during and on account of the rendition of such services and where, in the judgment of the producer, it is necessary for the artist to remain on such location overnight, the producer agrees to furnish necessary lodging for the artist. The artist shall not be deemed to be on location when rendering services at or near the studio then generally used by the producer as the base for the production of its photoplays.

19. The artist expressly agrees that until the expiration of the term hereof he will be available at all times in Los Angeles, California, or at any other place the producer may designate, unless excused in writing by the producer. The artist further agrees that if and when requested by the producer to do so, he will report at the producer's studio, or at any other place the producer may designate, for wardrobe fittings, publicity interviews, publicity photograph sittings, making tests and/or "stills", and for such discussions as the producer may deem necessary or desirable; it being understood, however, that no compensation whatsoever shall be or become payable to the artist for the compliance by the artist with such request of the producer.

20. Where necessary herein, all terms used in the masculine gender shall apply to the feminine gender.

~~21. The producer may transfer or assign all or any part of its rights hereunder to any person, firm or corporation, and this agreement shall inure to the benefit of the producer, its successors or assigns.~~

Rider

21. The producer may transfer or assign all or any part of its rights hereunder to any so-called "major" producer of photoplays or to any so-called "independent" producer whose photoplays are released or distributed by or through a "major" releasing or distributing organization, and this agreement shall inure to the benefit of the producer, its successors or assigns.

22. On condition that the artist shall fully and completely keep and perform each and every term and condition of this agreement on his part to be kept or performed, the producer agrees to compensate the artist therefor and for all rights herein granted and/or agreed to be granted by the artist to the producer at the rate of —Six Hundred— Dollars (\$600.00) per week, payable for each week during which the artist shall have actually rendered his services hereunder (other than as provided in paragraph 19 hereof) either in connection with the production of a photoplay or photoplays or in the performance of any of his other required services hereunder. Conditioned as aforesaid, the producer agrees that compensation will be paid to the artist for a period or aggregate of periods of not less than Twenty (20) during the original term hereof and for a period or aggregate of periods of not less than twenty (20) weeks during each six (6) months optional period of employment for which an option is exercised hereunder, and for a period or aggregate of periods of not less than forty (40) weeks during each one (1) year optional period of em-

ployment for which an option is exercised hereunder; provided, however, that the foregoing shall be deemed to have been fully complied with in any year of this agreement for which compensation shall be paid to the artist for a period or aggregate of periods of forty (40) weeks. In computing compensation to be paid or deducted with respect to any period of less than a week, the weekly rate shall be prorated, and for this purpose the rate per day shall be one-sixth ($1/6$) of the weekly rate. For the purposes of this paragraph the term "year of this agreement" shall be deemed to mean any period of three hundred sixty-five (365) consecutive days. If during the original term hereof or during any optional period of employment for which an option is exercised hereunder, this agreement be suspended, pursuant to any provision for suspension herein contained, or if the producer refuse to pay the artist compensation pursuant to any right to do so herein granted to the producer, then the minimum periods hereinabove specified, during which the producer is obligated to pay compensation to the artist, shall be reduced by a period equivalent to the period or aggregate of periods of such suspension or suspensions or refusal to pay. Any compensation due the artist hereunder shall be payable on Wednesday of each week for services rendered up to and including the Saturday preceding. During any period or periods in which the artist is not entitled to compensation pursuant to the provisions of this paragraph, he shall be deemed to be laid off without pay, and during such periods, of course, the artist shall not have the right to render his services for any person, firm or corporation without the written consent of the producer first had and obtained. Any such layoff of the artist shall be for a period of at least one (1) consecutive week subject to recall for retakes and

added scenes, but if there remains insufficient time at the end of the term hereof to lay the artist off for a period of at least one (1) consecutive week during the balance of said term, the producer may, nevertheless, lay off the artist for the remaining unexpired balance of said term even though such balance be less than one (1) week. During any such layoff period the producer may recall the artist for retakes and added scenes. For the purposes of the preceding two sentences any period or periods during which the artist is not entitled to compensation pursuant to the provisions of paragraphs 8, 9 or 12 hereof shall not be deemed to be layoff periods. [24]

22a. On condition that the artist fully and completely keeps, performs and observes each and every term, covenant and condition of this agreement on his part to be kept, performed and observed, the producer agrees to give the artist credit as a featured player on the screen in connection with the original English language version of each photoplay in which the artist appears hereunder. The producer shall not be obligated to give the artist credit in connection with foreign versions, whether the same be so-called "remakes" or "dubbed" versions, of any such photoplay. Nothing herein contained shall be construed so as to prevent so-called "trailer" and/or other advertising on the screen without mentioning the name of the artist, and no casual or inadvertent failure to comply with the provisions of this paragraph shall constitute a breach of this agreement.

23. The term of employment hereunder shall commence on a date to be designated by the producer, which date shall not be later than the day next following the latest

date on which the option granted to the producer under the terms of that certain agreement dated November , 1938, between the artist and the producer, can be exercised, and shall continue for a period of six (6) months from and after said date.

~~23.~~ The term of employment hereunder shall
 commence on ;
~~19~~ ; and shall continue for a period of
~~()~~ from and after said date. In con-
 sideration of the execution of this agreement by the pro-
 ducer and of the consent of the producer to the amount
 of compensation herein set forth, the artist hereby gives
 and grants to the producer the following rights or options:

(a) To extend the term of employment of the artist for an additional period of Six (6) Months from and after the expiration of the term hereinbefore specified, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this first extended period at the rate of —Six Hundred— Dollars (\$600.00) per week.

(b) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said first extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this second extended period at the rate of —Seven Hundred Fifty— Dollars (\$750.00) per week.

(c) To extend the term of employment of the artist for an additional period of One (1) Year from and after

the expiration of said second extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this third extended period at the rate of —One Thousand—Dollars (\$1000.00) per week. [25]

(d) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said third extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this fourth extended period at the rate of —Fifteen Hundred—Dollars (\$1500.00) per week.

(e) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said fourth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this fifth extended period at the rate of —Two Thousand—Dollars (\$2000.00) per week.

(f) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said fifth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this sixth extended period at the rate of —Twenty-five Hundred— Dollars (\$2500.00) per week.

(g) To extend the term of employment of the artist for an additional period of One (1) Year from and after the expiration of said sixth extended period, upon the

same terms and conditions as herein contained, except that compensation shall be paid to the artist for this seventh extended period at the rate of —Three Thousand— Dollars (\$3000.00) per week.

(h) To extend the term of employment of the artist for an additional period of ()
from and after the expiration of said seventh extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this eighth extended period at the rate of Dollars (\$) per week.

(i) To extend the term of employment of the artist for an additional period of ()
from and after the expiration of said eighth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this ninth extended period at the rate of Dollars (\$) per week.

(j) To extend the term of employment of the artist for an additional period of ()
from and after the expiration of said ninth extended period, upon the same terms and conditions as herein contained, except that compensation shall be paid to the artist for this tenth extended period at the rate of Dollars (\$) per week.

(k) To extend the term of employment of the artist
for an additional period of ()
from and after the expiration of said
tenth extended period; upon the same terms and con-
ditions as herein contained; except that compensation
shall be paid to the artist for this eleventh extended
period at the rate of Dollars
(\$) per week.

(l) To extend the term of employment of the artist
for an additional period of ()
from and after the expiration of said
eleventh extended period; upon the same terms and con-
ditions as herein contained; except that compensation
shall be paid to the artist for this twelfth extended period
at the rate of Dollars (\$)
per week.

(m) To extend the term of employment of the artist
for an additional period of ()
from and after the expiration of said
twelfth extended period; upon the same terms and con-
ditions as herein contained; except that compensation
shall be paid to the artist for this thirteenth extended
period at the rate of Dollars
(\$) per week.

Each option hereinbefore referred to may be exercised
separately at least thirty (30) days prior to the expira-
tion of the respective next preceding period of employ-

ment, or the producer, at any time, but at least thirty (30) days prior to the expiration of the term hereof or of any extension thereof; may elect to exercise all or any of the options not already exercised, in which event the term of this agreement shall be extended by the period or periods specified in the option or options so exercised by the producer. The exercise by the producer of any one or more of said options shall not be construed as an election by it not to exercise the remaining options. All notices of the exercise of any option shall be in writing and shall be served upon the artist within the periods above specified.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

UNIVERSAL PICTURES COMPANY, INC.

By (signed) CLIFF WORK

Vice-President

And (signed) EDWARD MUHL

Assistant Secretary

(signed) ROBERT CUMMINGS

(Robert Cummings)

(Artist) [26]

[Verified.]

[Endorsed]: Filed Sep. 23, 1943, 1:08 p. m. J. F. Moroney, County Clerk; by M. Enfield, Deputy.

[Endorsed]: Endorsed: Filed Oct. 20, 1943. [27]

[Title of Superior Court and Cause.]

ANSWER

Defendant Universal Pictures Company, Inc. answers the complaint herein as follows:

Answer to First Cause of Action

I.

Defendant admits the allegations contained in paragraph I of the first cause of action of said complaint.

II.

Referring to paragraph II of said first cause of action defendant admits the allegations with regard to the execution of the contract annexed to said complaint and marked Exhibit A; admits that since November 21, 1938, said contract has at various and sundry times been amended by the parties and admits that said contract was subsisting between said parties at all times from November 21, 1938 to and including May 29, 1943, [28] and alleges that said contract is still subsisting and in full force and effect between said parties. Except for the foregoing express admissions defendant has not sufficient information or belief upon the subject to enable it to answer the allegations contained in said paragraph II, and therefore, and placing its denial upon that ground, denies each and all of the allegations contained therein except as hereinabove admitted.

III.

Defendant admits the allegations contained in paragraph III of said first cause of action.

IV.

Referring to paragraph IV of said first cause of action defendant admits and alleges that the portrayal of the role of Hank was completed on or about May 19, 1943.

V.

Defendant admits that on May 18, 1943, it served a written notice upon plaintiff, a copy of which notice is set out in full in paragraph V of the first cause of action. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph V.

VI.

Referring to paragraph VI of said first cause of action defendant admits that between the dates of April 10, 1943 and May 18, 1943, both inclusive, it sent to plaintiff no written notices of any kind except as set forth in said complaint. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph VI.

VII.

Referring to paragraph VII of said first cause of action defendant admits that Exhibit A attached to said complaint provides that any compensation due plaintiff was and is payable on Wednesday of each week for services rendered up to and [29] including the Saturday preceding, and defendant further admits that it failed and refused to pay any salary to plaintiff on May 26, 1943 and has failed and refused to pay any salary to plaintiff since said date for the reason that plaintiff has been under suspension during all of said time for failure to comply with the provisions of the contract of November 21, 1938 and amendments thereof referred to in para-

graph II of said first cause of action. Except for the foregoing express admissions defendant denies each and all of the allegations contained in said paragraph VII.

VIII.

Defendant admits the receipt of the written notice dated May 29, 1943 and set forth in paragraph VIII of said first cause of action. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph VIII.

IX.

Defendant admits giving the written notice to plaintiff dated June 2, 1943 and set forth in paragraph IX of said first cause of action. Except for the foregoing express admission defendant denies each and all of the allegations contained in said paragraph IX.

X.

Defendant denies the allegations contained in paragraph XI of said first cause of action.

Answer to Second Cause of Action

I.

Defendant hereby repeats paragraphs I to VII inclusive of its answer to the first cause of action and incorporates the same herein as if set out in full. [30]

II.

Defendant denies the allegations contained in paragraph II of said second cause of action.

III.

Defendant denies that it is indebted to plaintiff in the sum of \$2,500 or in any other sum or at all, either as

alleged in plaintiff's second and separate cause of action or otherwise.

Answer to Third Cause of Action

I.

Defendant hereby repeats paragraphs I and II of its answer to the first cause of action and incorporates the same herein as if set out in full.

II.

Defendant denies each and all of the allegations contained in paragraph II of said third cause of action.

III.

Defendant has not sufficient information or belief upon the subject to enable it to answer the allegations contained in lines 25 to 32 inclusive on page 11 and the first four words in line 1 on page 12 of said complaint, and therefore, and placing its denial upon that ground, denies each and all of the allegations contained therein. Defendant denies each and all of the remaining allegations contained in paragraph III of said third cause of action, to wit, the allegations contained in lines 1 to 11 inclusive on page 12 of said complaint.

IV.

Referring to paragraph IV of said third cause of action defendant admits that it asserts that there have been no breaches of said contract committed by it and that plaintiff neither had nor has any right to terminate said contract. [31]

Answer to Fourth Cause of Action

I.

Defendant hereby repeats paragraphs I to X inclusive of its answer to the first cause of action and paragraphs II, III and IV of its answer to the third cause of action, and incorporates the same herein as if set out in full.

II.

Referring to paragraph II of said fourth cause of action defendant admits that prior to April 10, 1943, it advised plaintiff that it desired to utilize his services to portray the role of Hank in a photoplay then entitled "Fired Wife"; that defendant expected to make said photoplay as a Class A picture; that the script deserved a fine cast and a good director and that the studio would try to secure the same; that an attempt had been made to secure the services of Teresa Wright, Charles Coburn and Eddie Rochester Anderson, but that defendant was unable to obtain their services. Defendant further admits that Leo McCarey has been for many years and is now recognized as one of the outstanding directors in the motion picture industry, and that Teresa Wright, Charles Coburn and Eddie Rochester Anderson are outstanding performers in the motion picture industry. Defendant further admits and alleges that the principal photography on said photoplay commenced on April 15, 1943 and was completed on May 19, 1943; that Leo McCarey did not direct said photoplay and that neither Teresa Wright, Charles Coburn nor Eddie Rochester Anderson portrayed or played any role in said photoplay. Except for

the foregoing express admissions defendant denies each and all of the allegations contained in paragraph II of said fourth cause of action.

III.

Referring to paragraph III of said fourth cause of [32] action defendant admits and alleges that since May 18, 1943 several written notices have been transmitted from defendant to plaintiff in the form of the letter attached hereto and marked Exhibit A, and under date of September 7, 1943 a letter was transmitted by defendant to plaintiff, a copy of which is attached hereto and marked Exhibit B. Defendant admits that plaintiff has been at all times able to render his services to defendant in accordance with the terms of said contract as amended. Except for the foregoing express admissions defendant denies each and all of the allegations contained in paragraph III of said fourth cause of action.

IV.

Referring to paragraph IV of said fourth cause of action defendant denies that an actual or any controversy exists between plaintiff and defendant by reason of any of the matters or things alleged in said fourth cause of action. In so far as the averments in said paragraph IV are intended to be allegations of fact as distinguished from assertions as to the position taken by plaintiff in connection with the controversy which plaintiff claims to exist between him and defendant, defendant denies each and all of such allegations. Defendant admits that plaintiff asserts his position to be as set forth in said paragraph IV, but denies that any of such assertions is well taken.

Wherefore, defendant prays that the court make an order declaring said contract of November 18, 1938, as amended, to be in full force and effect and that defendant's acts and conduct in connection therewith, as set forth in the complaint, were and are proper and justified by plaintiff's acts and conduct in the premises, for defendant's costs incurred herein and for such other relief as to the court shall seem meet.

LOEB AND LOEB

By Milton H. Schwartz

Attorneys for Defendant [33]

EXHIBIT A

(UNIVERSAL PICTURES COMPANY, INC.)

Letterhead

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummings

8511 Sunset Boulevard

Los Angeles, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing June 25, 1943. This is to notify you that we have elected to and do hereby exercise

the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [34]

EXHIBIT B

(UNIVERSAL PICTURES COMPANY, INC.)

Letterhead

September 7, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

8511 Sunset Boulevard

Los Angeles, California

Dear Mr. Cummings:

This will acknowledge receipt of your telegram of September 1, 1943.

Despite all statements and notices by you to the contrary, we will continue to treat and consider your contract of employment with us dated November 21, 1938, as amended, as being in full force and effect.

Under its terms you are precluded from rendering services for anyone else without our prior consent. The consent given to you in connection with the "Stars Over Hollywood" radio program was made without prejudice to or waiver of our rights. All rights and remedies which we may have in the premises are expressly reserved.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [35]

[Verified.]

[Endorsed]: Filed Oct. 6, 1943, 3:14 p. m. J. F. Moroney, County Clerk; by M. Enfield, Deputy.

[Endorsed]: Filed Oct. 20, 1943. [36]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO FEDERAL COURT

The verified petition of Universal Pictures Company, Inc., a corporation, respectfully shows:

I.

At the commencement of the within action and at all times material herein, defendant Universal Pictures Company, Inc. was and it now is a corporation duly organized and existing under and by virtue of the laws of the state of Delaware and duly authorized to transact and transacting business in the state of California. By reason of the foregoing facts said defendant at all times material herein has been and now is a citizen of the state of Delaware.

II.

Defendant Universal Pictures Company, Inc. is informed and believes, and therefore alleges, that at the commencement of the within action and at all times material herein, plaintiff was and now is a citizen of the state of California residing within the Southern District of California, Central Division.

III.

The within cause is one and presents a controversy wholly between citizens of different states, to wit: between plaintiff, a citizen of California, and defendant Universal Pictures Company, Inc., a citizen of Delaware.

IV.

The matter in controversy herein, exclusive of interest and costs, exceeds in value the sum of \$3,000, said matter being the right of plaintiff to recover the sum of

\$10,250, claimed to be due plaintiff from defendant as salary.

V.

The within cause is one of which the United States District Court is given original jurisdiction in that it is a cause wholly between citizens of different states in which the matter in controversy exceeds in value the sum of \$3,000.

Wherefore, defendant Universal Pictures Company, Inc., respectfully prays that the within cause be transferred and removed to the United States District Court for the Southern District of California, Central Division, and that all further proceedings herein be stayed.

Dated: September 28, 1943,

LOEB AND LOEB

By Milton H. Schwartz

Attorneys for Defendant Universal Pictures
Company, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

28 U. S. C. A., section 71, 72;

Parkinson v. Barr, 105 Fed. 81;

Loot v. Winters' Estate, 115 Fed. 362.

[Verified.]

Received copy of the within Petition this 6th day of October, 1943. Roth & Branner & Joseph J. Cummins. Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 6, 1943, 3:14 p. m. J. F. Moroney, County Clerk; by M. Enfield, Deputy.

[Endorsed]: Filed Oct. 20, 1943.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL TO FEDERAL COURT
AND STAY OF PROCEEDINGS

This matter having come on regularly to be heard in Department 35 of the above-entitled court, upon the petition of defendant Universal Pictures Company, Inc., and it appearing that the within cause is wholly between citizens of different states, that the matter in controversy exceeds in value the sum of \$3,000.00 and that the action is one of which the United States District Court is given jurisdiction, and that defendant Universal Pictures Company, Inc. has duly petitioned for removal thereof to the United States District Court for the Southern District of California, Central Division, and has filed a good and sufficient bond in connection therewith.

Now, Therefore, It Is Ordered that the within action be, and it hereby is, transferred and removed to the United States District Court for the Southern District of California, Central Division. [37]

It Is Further Ordered that all proceedings herein in the within court be, and they hereby are, stayed.

Dated: October 13, 1943.

ALFRED L. BARTLETT

Judge

[Endorsed]: Filed Oct. 13, 1943. J. F. Moroney,
County Clerk; by J. D. John, Deputy.

[Endorsed]: Filed Oct. 20, 1943. [38]

In the District Court of the United States
Southern District of California
Central Division
No. 3242-H

ROBERT CUMMINGS, Plaintiff,
vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation, Defendant.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation, Cross-complainant,
vs.

ROBERT CUMMINGS, Cross-defendant.

ORDER TO SHOW CAUSE

Upon reading and filing the verified counterclaim of defendant and cross-complainant, Universal Pictures Company, Inc., herein, and good cause appearing therefor,

It Is Hereby Ordered that cross-defendant, Robert Cummings, be, and appear before this court before the Honorable H. A. Hollzer, District Judge thereof, in the Post Office and Court House, Los Angeles, California, at the hour of 10:00 o'clock A. M., on Monday, October 25, 1943, then and there [40] to show cause, if any he has, why an injunction pendente lite should not be issued enjoining him from rendering or offering to render, or agreeing to render his services to any person, firm or corporation other than cross-complainant, Universal Pictures Company, Inc., and particularly from rendering his services in connection with the broadcast of the "Lux Theater of the Air" program scheduled for October 25, 1943, or on any other date or for any other radio program.

Dated: October 20th, 1943.

Paul J. McCormick
Judge

[Endorsed]: Filed Oct. 20, 1943. [41]

[Title of District Court and Cause.]

COUNTERCLAIM

Universal Pictures Company, Inc., defendant and cross-complainant, complains of Robert Cummings, plaintiff and cross-defendant by way of counterclaim or cross-complaint as follows:

I.

Cross-complainant is, and at all times hereinafter mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and engaged in the business of producing motion pictures, with its studio in the County of Los Angeles, State of California. [44]

II.

Cross-defendant is, and at all times herein mentioned has been, an actor performing on the screen and upon radio programs.

III.

On or about November 21, 1938, cross-complainant and cross-defendant entered into an agreement in writing under and by virtue of the terms of which cross-complainant engaged and employed cross-defendant to render, and said cross-defendant agreed to render, his exclusive services as an actor in such roles and in such photoplays or other productions as cross-complainant might designate. The period for the performance of services by cross-defendant for cross-complainant has not yet elapsed, and under said contract cross-defendant is, and will remain obligated to cross-complainant to perform services thereunder. A copy of said contract is attached to the original complaint on file herein and is hereby referred to and incorporated by reference.

IV.

Cross-defendant agreed under the terms of said written agreement that during the term thereof he would not render his services as an actor or pose, act or appear in photoplays, or in any way connected with radio or other productions, shows or performances for any person, firm or corporation other than cross-complainant without the written consent of cross-complainant first had and obtained. Cross-defendant further agreed that he would not consent to, nor permit any other person to advertise, announce or make known, directly or indirectly, by paid advertisements, press notices or otherwise that he had contracted to do or perform any act or services contrary to the terms of said written agreement. Said written agreement further provided, and provides, that cross-defendant shall at no time during the term of said agreement grant the right to, authorize or willingly permit [45] any person, firm or corporation other than cross-complainant to make use of his name or any reproduction of his physical likeness or of his voice.

V.

The starting salary of cross-defendant under said contract was the sum of \$600.00 per week, and said contract provided for increases in the rate of compensation upon the exercise of various options therein contained. Said options have been duly and regularly exercised by cross-complainant, and the present salary of cross-defendant is the sum of \$1,500.00 per week. At the time of the execution of the contract aforesaid, the fair and reasonable value of cross-defendant's exclusive services as a motion picture actor did not exceed the amount agreed upon in said contract to be paid for such

services, and said contract was, and is fair, just and equitable to each of the parties thereto. At all times since the inception of said contract the minimum compensation for cross-defendant's services to cross-complainant has been, and now is at the rate of more than \$6,000.00 per annum.

VI.

Cross-complainant has duly performed all of the terms, conditions and promises required on its part to be performed under said written agreement.

VII.

On or about April 12, 1943, cross-defendant failed and refused, and ever since said time has failed and refused and still fails and refuses, to perform or render his exclusive or any services as a motion picture actor in motion pictures to be produced by cross-complainant.

VIII.

On or about October 18, 1943, cross-defendant threatened, and still threatens to, and intends to, and unless restrained by this Court will, further violate the terms and [46] provisions of said written agreement by rendering, and agreeing to render, his services as an actor in the "Lux Theater of the Air" in a radio broadcast to be held on Monday, October 25, 1943. Cross-complainant further alleges that in the radio broadcast on October 18, 1943, of the "Lux Theater of the Air," the announcer on said program announced over the air that on Monday, October 25, 1943, cross-defendant would appear on said "Lux Theater of the Air" program in a play entitled "Slightly Dangerous." Cross-complainant is

informed and believes, and upon such information and belief further alleges, that cross-defendant intends to, and unless restrained by this Honorable Court, will agree to render and render services in other radio broadcasts and for persons, firms or corporations other than cross-complainant.

IX.

Cross-complainant has not given its permission, either written or otherwise, to cross-defendant to appear in said, or any radio program, as required by said written agreement as hereinabove alleged, or to perform services for any person, firm or corporation, and such appearance, if made, and the performance of services for any person, firm or corporation other than cross-complainant, will be a further breach of said written agreement and of the provisions thereof referred to hereinabove. In this connection cross-complainant alleges that under and by virtue of the provisions of said written agreement, cross-defendant agreed that cross-complainant might have injunctive and other equitable relief to prevent any breach of said agreement by cross-defendant.

X.

The services of cross-defendant as an actor are special, unique, extraordinary and artistic in character, and cross-defendant has become popular with the motion picture and radio public. [47]

XI.

The violation of said written agreement by cross-defendant in the manner hereinabove alleged will, unless

restrained by this Honorable Court, irreparably injure cross-complainant in that cross-complainant will be deprived of the special, unique, extraordinary and artistic services of cross-defendant and said services will become available to, and be availed of by, cross-complainant's competitors and other persons, firms and corporations, and further in that cross-complainant will be deprived of the opportunity of producing motion pictures in which cross-defendant appears and thereby will be deprived of the profits and gains which can or may be realized therefrom. The amount of profits and gains that will so be lost cannot be ascertained or estimated for the reason that the monetary returns on and from motion pictures vary with each individual picture and cannot be known in advance. Cross-complainant's remedy at law will be, and is, inadequate in that its damages cannot, and could not be adequately or entirely ascertained, as hereinabove alleged, and further in that, as cross-complainant is informed and believes and therefore alleges, cross-defendant is not, and would not be, able to respond to any judgment for the amount of ascertainable damages which would be suffered by cross-complainant.

XII.

Cross-complainant is, and at all times has been, ready, able and willing to perform its obligations under said contract, and hereby offers to continue to perform all of its obligations under said contract upon the resumption and continuance by cross-defendant of the performance of his obligations thereunder.

Wherefore, cross-complainant prays:

1. That an order to show cause issue; and that upon the hearing thereof an injunction pendente lite be made and [48] entered herein restraining and enjoining cross-defendant from rendering or offering to render, or agreeing to render his services to any person, firm or corporation other than cross-complainant, Universal Pictures Company, Inc., and particularly from rendering his services in connection with the broadcast of the "Lux Theater of the Air" program scheduled for October 25, 1943, or on any other date or for any other radio program;

2. That upon a trial hereof a permanent injunction be made and entered herein restraining and enjoining cross-defendant from rendering, offering to render or agreeing to render his services to any person, firm or corporation other than cross-complainant, until such time as he shall have complied with his obligations to cross-complainant and shall no longer be obligated to perform services for cross-complainant, and

3. For costs, and for such other and further relief as to the Court may seem proper or equitable.

LOEB AND LOEB

By NORMAN NEWMARK

Norman Newmark

Attorneys for Universal Pictures Company, Inc.,
defendant and cross-complainant [49]

[Verified.]

[Endorsed]: Filed Oct. 20, 1943. [50]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT SPEERS

State of California

County of Los Angeles—ss.

I, Robert Speers, being duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and was at all times mentioned herein employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be [51] referred to as Universal) in the capacity of a casting director, and that I render my services for Universal at Universal City, California. My duties among other things as casting director are to notify and to assign actors for roles to be portrayed by them in photoplays scheduled to be produced by Universal. On or about the 25th day of March, 1943, I notified Robert Cummings, the plaintiff and cross-defendant in the above entitled action (who will hereinafter be referred to as Cummings), that Universal desired him to portray the role of "Hank" in the photoplay entitled "Fired Wife." On April 10, 1943, at Universal City, California, in a conversation with Cummings in my office, Cummings told me that he was considering refusing to render his services in said photoplay for the principal reason that the director selected for said photoplay did not meet with his approval and also because he was thinking of signing up with the "Service" for the duration of the war. I told Cummings that such refusal on his part at such a late date would not be fair to Universal, as he was cognizant of the fact that photography of the photoplay referred to herein was scheduled to start on April 12, 1943, and that if his

objections to the selected director were so serious as to have resulted in his refusal and determination not to render his services in said role, he should have so advised me at a much earlier date. Cummings then told me that he understood the position in which Universal would be placed by his refusal to accept the role assigned to him, but that he could not make up his mind definitely whether to render the said services but would let me know. On April 12, 1943, I had a telephone conversation with Cummings relative [52] to the same subject matter as is hereinabove set forth, and Cummings stated to me that he had decided not to render the services requested of him by Universal and would not appear at the studios of Universal to portray the said role herein referred to. Cummings did refuse to report and did not appear to render the said services for the role assigned him, and it therefore became necessary to assign another actor to replace Cummings and this was done. Cummings has failed and refused, and continues to fail and refuse, to report for work at the studios of Universal.

Robert Speers
Robert Speers

Subscribed and sworn to before me this 21st day of October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California

My commission expires June 29, 1945.

[Endorsed]: Filed Oct. 22, 1943. [53]

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Cross-defendant Robert Cummings answers the counterclaim herein as follows:

I.

Admits the allegations of Paragraphs I and II of said counterclaim.

II.

Referring to Paragraph III of said counterclaim, cross-defendant admits that an agreement in writing was entered into between cross-defendant and cross-complainant on November 21, 1938; a copy of said contract is attached to the original complaint [55] on file herein.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged in Paragraph III.

III.

Referring to Paragraph IV of the counterclaim, cross-defendant admits he executed the written agreement dated November 21, 1938, with cross-complainant, a copy of which is attached to the original complaint on file herein. Said written contract is hereby referred to and incorporated by reference. Cross-defendant admits that he agreed to the terms of said written agreement attached to the original complaint on file herein.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged in Paragraph IV.

IV.

Referring to Paragraph V of the counterclaim, cross-defendant admits that the written contract referred to as "Exhibit A" provided for a starting salary of \$600.00 per week and for increases in the rate of compensation upon the exercise of various options therein provided, and further that options provided for in said contract were prior to April 12, 1943 duly and regularly exercised, and that the compensation of cross-defendant prior to April 12, 1943, was at the rate of \$1500.00 per week. It is further admitted that at all times since the execution of said written contract, referred to as "Exhibit A," the minimum compensation provided to be paid for cross-defendant's services was at all times prior to April 12, 1943, in excess of \$6000.00 per annum.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged [56] in said Paragraph V.

V.

Referring to Paragraph VI of the counterclaim, cross-defendant denies generally and specifically all the matters and things therein set forth and alleged.

VI.

Referring to Paragraph VII of the counterclaim, cross-defendant admits that he has not performed any services as a motion picture actor in motion pictures for cross-complainant since April 12, 1943, but in all other respects denies generally and specifically all the matters and things alleged in Paragraph VII. In this connection cross-defendant refers to his complaint on file herein and hereby incorporates by reference said complaint and each of its causes of action as a further answer to said Paragraph VII.

VII.

Referring to Paragraph VIII of said counterclaim, cross-defendant admits that he made arrangements to render his services as an actor in the "Lux Theater of the Air" in a radio broadcast to be held on Monday, October 25, 1943, and that he intends to and will render such services in said program on said date unless restrained by the court from so doing. Cross-defendant has no information or belief as to any announcements made in a radio broadcast on October 18, 1943, of the "Lux Theater of the Air," or at any other time, or through any other program, of the fact that he would appear on said "Lux Theater of the Air" in a play entitled "Slightly Dangerous." For lack of such information or belief, cross-defendant denies generally and specifically said allegations, except as herein admitted. Cross-defendant denies generally and specifically all other matters and things set forth and alleged in said Paragraph VIII. [57]

VIII.

Referring to Paragraph IX of said counterclaim, cross-defendant admits that he has not requested permission from cross-complainant to appear on the "Lux Theater of the Air" a radio broadcast to be held on October 25, 1943, and that cross-complainant has not given him any such permission. It is further admitted that the written agreement referred to as "Exhibit A" provides that cross-complainant might have injunctive and other equitable relief to prevent certain breaches of said written agreement by cross-defendant. Cross-defendant alleges that said written agreement referred to as "Exhibit A" is no longer in force and effect and hereby refers to the original complaint on file herein, and each of its causes of action, and by said reference makes said original complaint a part of his answer to said Paragraph IX.

In all other respects cross-defendant denies generally and specifically all the matters and things set forth and alleged in Paragraph IX.

IX.

Referring to Paragraph X of said counterclaim, cross-defendant admits that he has become popular with the motion picture and radio public and that his services are artistic in character, but denies that said services are especially unique or extraordinary in the legal significance of said words as they pertain or are pertinent to the enforcement of negative covenants or the right to alleged injunctive relief as provided for in Section 526 of the Code of Civil Procedure and Section 3423 of the Civil Code of the State of California.

X.

Referring to Paragraph XI of said counterclaim, cross-defendant alleges that there is no written agreement between cross-defendant and cross-complainant in existence and that [58] there has been no such written agreement since May 29, 1943. Cross-defendant refers to his complaint on file herein and each of its causes of action, and by such reference specifically makes the complaint and each of its causes of action a part of his answer to said Paragraph XI. Cross-defendant denies generally and specifically all matters and things set forth and alleged in Paragraph XI.

XI.

Referring to Paragraph XII of said counterclaim, cross-defendant denies generally and specifically all matters and things therein set forth and alleged.

Wherefore, cross-defendant prays that the order to show cause heretofore issued be dismissed, and that cross-complainant take nothing by its counterclaim or otherwise; that cross-defendant have its costs incurred herein, and such other and further relief as to the Court may seem proper and equitable.

ROTH AND BRANNEN, and
J. J. CUMMINS

By LESTER WM. ROTH
Attorneys for Robert Cummings [59]

[Verified.]

Received copy of the within document. Rec'd Oct. 29, 1943. Loeb and Loeb, By E. Evans.

Invalid unless countersigned.

[Endorsed]: Filed Oct. 30, 1943. [60]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To the Defendant above-named, and to Messrs. Loeb and Loeb, its attorneys:

You, and Each of You, Will Please Take Notice, that on the 5th day of November, 1943, at the hour of ten (10) o'clock A. M. of said day, or as soon thereafter as counsel may be heard, before the Honorable Harry A. Hollzer, Judge thereof, in Courtroom No. 2 of said Court, the plaintiff above-named will, under the provisions of Rule 56 of the Federal Rules of Civil Procedure, move

the court for an order directing that summary judgment be entered herein on the first count or cause of action [61] in favor of plaintiff and against the defendant.

Said motion will be made upon the ground that as to the claims set forth in said first count or cause of action there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment upon said count or cause of action as a matter of law. Said motion will be made and based upon plaintiff's complaint filed herein, defendant's answer thereto, upon the affidavit of Robert Cummings, filed or to be filed herein, upon the affidavit of Oscar R. Cummins, filed or to be filed herein, and such other affidavits as may be filed herein prior to the hearing, and points and authorities served and filed herewith, and upon all of the records and files in said action, and the minutes of the Court.

Dated: October 29th, 1943.

ROTH AND BRANNEN, and
J. J. CUMMINS

By Lester Wm. Roth

Attorneys for Plaintiff

Office and Postoffice address—

621 S. Hope Street, Suite 1220

Los Angeles 14, California

Telephone—TRinity 1851

[Endorsed]: Filed Oct. 30, 1943. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT CUMMINGS
RE PRELIMINARY INJUNCTION.

Robert Cummings, being duly sworn, deposes and says: I am plaintiff and cross-defendant in the above entitled action.

Reference is hereby made to the complaint on file herein and the answer of defendant, Universal Pictures Company, Inc., hereinafter referred to as "Universal," and both said complaint and said answer are by such reference made a part hereof. [66]

In addition to the written communications between myself and Universal which are set forth in the complaint on file herein and the answer in reply thereto, the only other written communications which have been exchanged between myself and Universal are Exhibits A to L, both inclusive, attached hereto and by reference made a part hereof.

There have been no other written communications of any kind exchanged between Universal and myself except those referred to in the foregoing paragraphs and there have been no communications, oral or otherwise, between Universal and myself in respect to the rendition of my services or the status of the alleged contract dated November 21, 1938, except those written communications which are attached hereto as exhibits and which are made a part of my original complaint or attached to Universal's answer to my said complaint.

It is true that I have made a commitment to perform on "Lux Theater of the Air," in a radio program entitled "Slightly Dangerous" on October 25, 1943. I have on many previous occasions performed on radio programs with and without the consent and permission of

Universal. Universal has never at any time in respect of said radio programs complained of my performance thereon or made the claim that by rendering my services in connection with said radio programs, or any of them, I have in any way interfered with their alleged contractual rights or in any way impaired their right to my services as a motion picture actor in motion pictures, or in any way depreciated the value of my services to them, which Universal asserts to be "special, unique, extraordinary and artistic."

From November 21, 1938, to May 29, 1943, I never rendered my services as a motion picture actor in motion pictures to anyone other than Universal, without the express permission and consent and pursuant to the direction and request of Universal. I did [67] prior to May 29, 1943, render my services as a motion picture actor in motion pictures to persons other than Universal with the consent and at the express direction of Universal.

Since May 29, 1943, I have not rendered my services as a motion picture actor in motion pictures to any person and I have made no commitment to any person to render my services as a motion picture actor in motion pictures to any person and I have no such commitments now.

It is not true as set forth and alleged in the counterclaim of Universal, and specifically in paragraph XI of said counterclaim, that if I render my services to the "Lux Theater of the Air" in the play entitled "Slightly Dangerous" on October 25, 1943, that Universal will be irreparably or otherwise damaged. My commitment to appear in said program is for a single night and calls for my services as a radio performer. Said services would in no way depreciate or lessen the value of my services as a motion picture actor in motion pictures to Universal,

or any other person, even assuming that Universal has a valid subsisting contract between itself and myself at the present time requiring me to render my services as a motion picture actor or otherwise to Universal. It is not true that I am financially irresponsible or unable to respond in an action at law for such damages as might be suffered by Universal, but on the contrary, if the position of Universal is true that a valid subsisting contract exists between myself and Universal, the means of satisfying any damages that might be suffered by Universal are in the control of Universal and could by Universal be applied to the satisfaction of any claim for damages that it might have against me by reason of my alleged breach of my alleged contract with Universal. The damages, if any, which may be suffered by Universal by reason of my appearance in "Slightly Dangerous," even assuming a valid existing contract [68] between myself and Universal, are inconsequential and easily ascertainable.

It is clear from the facts alleged in the complaint and in the counterclaim of Universal that Universal has a plain, clear, speedy and adequate remedy at law.

The fact is that between April 10, 1943, and May 29, 1943, Universal never at any time, as is required by the contract dated November 21, 1938, requested me to perform or render any services to it other than its request that I render services in the play "Fired Wife" as is more particularly alleged in my complaint. Universal has paid me no compensation under said alleged contract, has placed me on continuous suspension, and takes the position contrary to the express terms of the alleged contract upon which Universal relies, that Universal does not have to use my services or request me to perform my services and that Universal may, in the absence of my prayerful re-

quest that it use my services, place me upon suspension indefinitely and thus prevent me from working for them and from earning a livelihood by working for others.

I have read the affidavit of Robert Speers filed herein and I deny generally and specifically all the matters and things set forth in said affidavit, commencing with the word "On" in line 12, page 2, to and including the word "know" in line 31, near the bottom of page 2.

Affiant further denies that he has, as averred by said Speers in his affidavit, failed and refused or that he continues to fail and refuse to report for work at the studio of Universal.

In respect to the matters and things averred by said Speers in his said affidavit, affiant specifically refers to the allegations made in the complaint of affiant herein and in each and every cause of action of said complaint, and makes all of said matters and things alleged in said complaint a part hereof [69] by such reference. Affiant further avers that there is nothing in the contract dated November 21, 1938, upon which Universal relies which requires affiant to report for work at the studio of Universal or any place else, except pursuant to the request and direction of Universal and in this connection affiant specifically avers that Universal has never made any request, demand or suggestion in accordance with the terms of said contract dated November 21, 1938, or otherwise, that affiant report to Universal at its studio or any place else, for work or for the rendition of his services.

Robert Cummings

Subscribed and sworn to before me this 23rd day of October, 1943.

(Seal)

Leo K. Gold

Notary Public in and for said County and State. [70]

EXHIBIT A

WESTERN UNION TELEGRAM

June 3, 1943

UNIVERSAL PICTURES COMPANY, INC.
UNIVERSAL CITY
CALIFORNIA

THIS WILL ACKNOWLEDGE RECEIPT OF YOUR WIRE OF JUNE 2, 1943. MY POSITION AS YOU WERE HERETOFORE NOTIFIED BY ME HAS NOT BEEN CHANGED AND I DENY EACH AND ALL OF THE STATEMENTS CONTAINED IN YOUR WIRE OF JUNE 2, 1943, WHICH ARE INCONSISTENT WITH THE POSITION HERETOFORE EXPRESSED BY ME.

ROBERT CUMMINGS [71]

EXHIBIT B

UNIVERSAL PICTURES COMPANY, INC.

Universal City California

June 24, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

8511 Sunset Boulevard

Los Angeles, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing May 19, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [72]

EXHIBIT C

POSTAL TELEGRAPH

June 25, 1943

Universal Pictures Company, Inc.

Universal City, California

THIS WILL ACKNOWLEDGE YOUR LETTER OF JUNE 24, 1943, AS I HAVE ALREADY NOTIFIED YOU THE CONTRACT OF EMPLOYMENT DATED NOVEMBER 21, 1938 HAS BEEN TERMINATED BY REASON OF YOUR MATERIAL BREACH THEREOF. ANY STATEMENT CONTAINED IN YOUR LETTER OF JUNE 24, 1943 INCONSISTENT WITH THIS FACT IS HEREBY DENIED. THIS WIRE IS SENT YOU WITHOUT PREJUDICE TO OR WAIVER OF ANY OTHER RIGHTS AND/OR REMEDIES WHICH I MAY HAVE IN THE PREMISES, ALL SUCH OTHER RIGHTS AND/OR REMEDIES BEING EXPRESSLY RESERVED BY ME.

ROBERT CUMMINGS

CHARGE TO CRESTVIEW 18119 [73]

EXHIBIT D

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

July 31, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

8511 Sunset Boulevard

Los Angeles, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing June 25, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [74]

EXHIBIT E

POSTAL TELEGRAPH

August 2, 1943

Universal Pictures Company, Inc.

Universal City, California

THIS WILL ACKNOWLEDGE YOUR LETTER OF JULY 31, 1943, AS I HAVE ALREADY NOTIFIED YOU THE CONTRACT OF EMPLOYMENT DATED NOVEMBER 21, 1938, HAS BEEN TERMINATED BY REASON OF YOUR MATERIAL BREACH THEREOF. ANY STATEMENT CONTAINED IN YOUR LETTER OF JULY 31, 1943, INCONSISTENT WITH THIS FACT IS HEREBY DENIED. THIS WIRE IS SENT YOU WITHOUT PREJUDICE TO OR WAIVER OF ANY OTHER RIGHTS AND/OR REMEDIES WHICH I MAY HAVE IN THE PREMISES, ALL SUCH OTHER RIGHTS AND/OR REMEDIES BEING EXPRESSLY RESERVED BY ME.

ROBERT CUMMINGS

CHARGE TO CRESTVIEW 18119 [75]

EXHIBIT F

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

August 28, 1943

Mr. Robert Cummings,
c/o Mr. Oscar Cummins,
9441 Wilshire Boulevard,
Beverly Hills, California.

Dear Mr. Cummings:

Enclosed please find copy of notice directed to the persons named therein, which is self-explanatory.

The fact that we have consented to your appearance on this program is not, nor shall the same be considered, a waiver of our right to your exclusive services, nor shall our consent be deemed to be a consent to the rendition of your services for any other person, firm or corporation on any other or different occasion.

This notice is served upon you without prejudice or waiver of any other rights and/or remedies which we may have, and all such other rights and/or remedies are expressly reserved by us and without prejudice or waiver of any other rights and/or remedies set up in any previous notice given you.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Registered

Special Delivery [76]

EXHIBIT G

POSTAL TELEGRAPH

September 1, 1943

UNIVERSAL PICTURES COMPANY, INC.
UNIVERSAL CITY,
CALIFORNIA

I ACKNOWLEDGE RECEIPT OF YOUR LETTER DATED AUGUST 28, 1943. MY APPEARANCE ON A RADIO PROGRAM IN QUESTION WAS MADE PURSUANT TO AN AGREEMENT BETWEEN MYSELF AND DARI-RICH, "STARS OVER HOLLYWOOD" PROGRAM. I DID NOT SEEK PERMISSION FROM YOU NOR DO I CONSIDER THAT I WAS OBLIGATED TO ASK PERMISSION FROM YOU. MY POSITION AS HERETOFORE GIVEN YOU THAT I AM UNDER NO CONTRACTUAL OR OTHER OBLIGATION TO YOU HAS NOT CHANGED. PLEASE BE FURTHER ADVISED THAT I WILL HOLD YOU STRICTLY ACCOUNTABLE FOR ANY DAMAGES RESULTING FROM YOUR UNAUTHORIZED NOTICE DATED AUGUST 28, 1943, TO CARI-RICH, "STARS OVER HOLLYWOOD" PROGRAM AND FROM ANY OTHER NOTICES, ACTIONS, OR INTERFERENCE TAKEN BY YOU OF A SIMILAR CHARACTER.

ROBERT CUMMINGS [77]

EXHIBIT H

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

September 7, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

This will acknowledge receipt of your telegram of September 1, 1943.

Despite all statements and notices by you to the contrary, we will continue to treat and consider your contract of employment with us dated November 21, 1938, as amended, as being in full force and effect.

Under its terms you are precluded from rendering services for anyone else without our prior consent. The consent given to you in connection with the "Stars Over Hollywood" radio program was made without prejudice to or waiver of our rights. All rights and remedies which we may have in the premises are expressly reserved.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl

jab/j [78]

EXHIBIT I

WESTERN UNION TELEGRAM

September 8, 1943

Universal Pictures Co. Inc.
Universal City,
California

YOUR REGISTERED LETTER OF SEPTEMBER FOURTH TO ROBERT CUMMINGS HAS BEEN RECEIVED BY ROBERT CUMMINGS AND TRANSMITTED TO ME AS HIS ATTORNEY FOR ATTENTION.

YOU ARE ADVISED AS YOU HAVE BEEN HERETOFORE THAT BY REASON OF YOUR MATERIAL BREACHES OF THE CONTRACT REFERRED TO IN YOUR LETTER OF SEPTEMBER FOURTH ROBERT CUMMINGS ON MAY 29, 1943 ELECTED TO AND DID TERMINATE SAID CONTRACT.

MR. CUMMINGS THEREFORE CONSIDERS SAID CONTRACT TO BE AT AN END AND HE HAS BEEN ADVISED THAT IT IS.

LESTER WM. ROTH [79]

EXHIBIT J

September 10, 1943

Universal Pictures Company, Inc.
Universal City,
California

Attention: Mr. Edward Muhl

Gentlemen:

In respect of your letter of the 7th to Robert Cummings, in care of Mr. Oscar Cummins, you are referred to the day letter of the writer addressed and transmitted to you on September 8th, 1943.

Yours very truly,

LESTER WM. ROTH
OF ROTH AND BRANNEN

LWR:DT [80]

EXHIBIT K

UNIVERSAL PICTURES COMPANY, INC.
Universal City, California

October 11, 1943

Registered Mail
Mr. Robert Cummings
c/o Mr. Oscar Cummins
9441 Wilshire Boulevard
Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal

and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks commencing September 7, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By J. A. Brewster

Assistant Treasurer

jab/j [81]

EXHIBIT L

October 15, 1943

Universal Pictures Company, Inc.,
Universal City,
California

Attention: J. A. Brewster
Asst. Treasurer

Gentlemen:

Your notice of October 11th addressed to Mr. Robert Cummings in care of Mr. Oscar Cummins has been transmitted to me for attention.

Our petition in respect to this notice is set forth in that certain action entitled "Robert Cummings vs. Universal Pictures Company, Inc." in the Superior Court No. 488314.

Yours very truly,

LESTER WM. ROTH
OF ROTH AND BRANNEN

LWR:DT

Received copy of the within document. Rec'd Oct. 29, 1943. Loeb and' Loeb, by E. Evans. Invalid unless countersigned.

[Endorsed]: Filed Oct. 30, 1943. [82]

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR R. CUMMINS

State of California

County of Los Angeles—ss.

Oscar R. Cummins, being first duly sworn deposes and says:

That he is an attorney at law, duly licensed to practice in all of the courts of the State of California and the District Court of the United States in and for the Southern District of California, Central Division.

That the plaintiff, Robert Cummings, is a client of your affiant and is and has been a client of your affiant at all times herein mentioned.

That affiant represented the plaintiff, Robert Cummings, in various and all negotiations with the defendant, Universal Pictures Company, Inc.

Your affiant avers that on or about the 26th day of May, 1943, at or about the hour of 2:30 P. M., affiant made [83] personal demand upon the defendant at defendant's studio in Universal City, California, for the salary check due plaintiff for the period after May 18, 1943; that your affiant was informed by the cashier at Universal Pictures Company, Inc., at Universal City, California, that there was no salary due and payable to the plaintiff and that the plaintiff was still on suspension.

Your affiant avers that the following morning, viz., May 27, 1943, at or about the hour of 11:00 A. M., affiant

telephoned to the cashier at Universal Pictures Company, Inc. and stated in words and substance as follows: "Is Robert Cummings' check ready?" to which said cashier replied in words and substance, "We have no check for Robert Cummings; we have received no instructions to put him back on the payroll."

Your affiant further avers that one-half hour later, to-wit, at about 11:30 A. M. of May 27, 1943, he requested his secretary, Belle Marco, to telephone to the cashier at Universal Pictures Company, Inc.; that your affiant listened-in on the telephone extension to the said conversation between affiant's secretary and the cashier of Universal Pictures Company, Inc.

Your affiant avers that his secretary inquired in words and substance as follows: "Is Robert Cummings' check ready?" to which the cashier's office at Universal Pictures Company, Inc., Universal City, California, whose telephone number is STanley 71211, replied in words and substance as follows: "There is no check for Bob; he is still on suspension."

Your affiant avers that he is and has been at all times herein mentioned the exclusive representative of the plaintiff in all negotiations and matters with the defendant corporation; that affiant is thoroughly conversant with the contract of November 21, 1938, as well as the various adjustments made thereto from time to time by and between the plaintiff and defendant corporation; that defendant corporation under said contract and [84] amendments was obliged to pay to the plaintiff various agreed

sums of money weekly for forty-two (42) weeks out of the fifty-two (52) week year; that defendant corporation reserved the right to lay off the plaintiff for ten (10) weeks at defendant's option and designation; that the said ten (10) weeks' lay-off periods had been consumed by the defendant corporation for the contractual year of 1942-1943 and hence there was no right to lay off the plaintiff for any further periods during the contractual year 1942-1943.

Further deponent saith not.

OSCAR R. CUMMINS

Oscar R. Cummins

Subscribed and sworn to before me this 30th day of October, 1943.

(Seal)

Leo K. Gold

Notary Public in and for the County of Los Angeles,
State of California.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 2, 1943. [85]

[Title of District Court and Cause.]

AFFIDVAIT OF B. W. STEINBERG
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, B. W. Steinberg, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mentioned herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [86] to as Universal), as Paymaster; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal from me or to my best knowledge from any person under my supervision.

B. W. Steinberg

B. W. Steinberg

Subscribed and sworn to before me this 22nd day of October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles.
State of California

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [87]

[Title of District Court and Cause.]

AFFIDAVIT OF DANIEL J. KELLEY
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, Daniel J. Kelley, being first duly sworn, depose and say:

I am a resident of the County of Los Angeles, State of California and am employed and at all times mentioned herein have been employed by Universal Pictures Company, Inc., the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred to as Universal), [88] as Production Executive in Charge of Talent, Writers and Directors. At no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein (who will hereinafter be referred to as Cummings) reported to the studios of Universal or to anyone connected with Universal for the purpose of rendering his services as an actor. Universal has at all times been and still is ready, willing and able to have Cummings resume his services for it under his employment contract. Before Universal made its employment contract with Cummings in November 1938, Cummings was not recognized as being among the top featured or leading players in motion pictures. During the entire time of its relationship with Cummings Universal has made every effort to assist him to become an important screen personality and to build him up as a top star and featured player. Largely through the efforts of Universal in casting Cummings in important roles in top budgeted pictures and publicizing him and giving him

strong supporting casts. Cummings has now become an important featured player and has established a popularity with the motion picture public. That the foregoing is true will appear from what follows in this affidavit.

We have made eleven pictures at Universal Studios in which Cummings played a role in the period between March 20, 1939, and March 23, 1943. The first of the pictures above referred to was "Three Smart Girls Grow Up" in which Deanna Durbin was the star. Deanna Durbin was then and is now one of the best known and most popular actresses on the screen. Cummings played the leading role opposite Deanna Durbin. The photoplay was produced for Universal by Joe Pasternak and directed by Henry Koster, each of whom is in the top rank of his profession in the motion picture industry. One of the supporting roles was played by Charles Winniger, a popular [89] and well-known character actor. The production cost on the picture was over \$800,000.00.

"The Under Pup," another photoplay produced by Joe Pasternak and directed by Richard Wallace, was a starring vehicle for Cummings and Gloria Jean. Among the important featured players who also appeared in this picture were Beulah Bondi, Virginia Weidler, Margaret Lindsay, C. Aubrey Smith, Billy Gilbert and Samuel S. Hinds. The production cost on this picture was over \$465,000.00.

The next picture for which Cummings rendered services for Universal was entitled "Rio" in which Basil Rathbone and Victor McLaughlin starred and in which Cummings was featured opposite Sigrid Gurie. Among the supporting cast were such prominent screen players as Leo Carrillo, Billy Gilbert and Maurice Moscovitch. The production cost of this picture was over \$448,000.00.

"Charlie McCarthy, Detective," the next picture in which Cummings played a featured role, included in the cast such well-known personalities as Edgar Bergen, Edgar Kennedy, and Samuel Hinds. The production cost of this picture was over \$363,000.00.

"Private Affairs," the next picture in which Cummings appeared for Universal, was produced by Glen Tryon and directed by Albert S. Rogell. Cummings played the male lead in this picture opposite Nancy Kelley, a well-known screen actress, and the supporting cast in this picture included Roland Young, Hugh Herbert and Montague Love.

Another picture in which Cummings played the leading role was "Spring Parade" in which Deanna Durbin was starred. This picture was also produced by Joe Pasternak and directed by Henry Koster, and the production cost was over \$950,000.00.

Cummings played a prominent role in "A Night in the [90] Tropics," a picture featuring Abbott and Costello. Other prominent and well-known players in the picture were Alan Jones, Nancy Kelley, Leo Carrillo and Mary Boland. The production cost was over half a million dollars.

Cummings played opposite Deanna Durbin again in the picture "It Started With Eve," in which Charles Laughton, Guy Kibbee and Walter Catlett, all prominent, popular screen actors, also appeared. The picture was produced by Joe Pasternak and directed by Henry Koster. The production cost was approximately \$1,250,000.00.

The picture "Saboteur" was a Frank Lloyd production directed by the distinguished English director, Alfred Hitchcock. Priscilla Lane and Cummings played the lead-

ing roles. Production cost of the picture was approximately \$780,000.00.

Cummings played the male leading role opposite Diana Barrymore in the Universal picture "Between Us Girls." The producer-director was Henry Koster. The supporting cast included Kay Francis, John Boles and Andy Divine. The cost of production of this picture was over \$835,000.00.

The latest picture in which Cummings has appeared for Universal and which has just been released is entitled "Flesh and Fantasy." The picture was produced for the defendant company by Charles Boyer and Julien Duvivier, and directed by Duvivier. The company in which Cummings appears as an actor in this picture includes Charles Boyer, Betty Field, Edward G. Robinson, C. Aubrey Smith, Barbara Stanwyck and Charles Wininger.

The foregoing statements as to the nature of the pictures in which Universal cast Cummings at its own studio is especially intended as a refutation of the allegations made in the third cause of action of plaintiff's complaint [91] and particularly in paragraphs 2 and 3 of that cause of action on pages 11 and 12. In essence the allegations are that defendant Universal in bad faith and with malice and for the purpose of discrediting plaintiff and imperiling his future, cast him in minor roles.

Under its contract with Cummings Universal has the right to lend Cummings' services to other motion picture producers and a number of loans in accordance with the contract have been made. In each case, in almost every cast, Cummings was cast in the most important male role in the picture, as will appear from the following: He appeared in "Kings Row" for Warner Bros. in 1941.

Other prominent screen actors in the cast were Ann Sheridan, Ronald Reagan and Betty Field. The director was Sam Wood, one of the most important directors in the motion picture industry. He appeared in "And One Was Beautiful" for Metro-Goldwyn-Mayer in which he received first billing. He played in "Free and Easy" for Metro-Goldwyn-Mayer in 1941 in which he received first male billing. R-K-O gave him first feature billing in the picture "The Devil and Miss Jones" in 1941, which picture starred Miss Jean Arthur, one of the outstanding motion picture actresses. In December 1939, Cummings played in "Everything Happens at Night" for Twentieth Century Fox in which the billing was as follows: Sonja Heinie, Ray Milland, Robert Cummings. In 1941 he played in "Moon Over Miami" for Twentieth Century Fox in which the billing was as follows: Don Ameche, Betty Grable, Robert Cummings. Warner Bros. have just released "Princess O'Rourke" in which Cummings receives first male billing and plays opposite Olivia de Havilland, another very important motion picture personality.

The original term of Universal's contract with Cummings was for six months at a salary of \$600.00 per week [92] for a minimum of twenty weeks. The contract gives Universal seven options on the services of Cummings, four of which had been exercised at the time that Cummings refused to perform any further services for Universal and this law suit resulted. The first exercised option was for an additional six months at \$600.00 per week for a minimum of twenty weeks. The second exercised option was for one year at \$750.00 per week for a minimum of forty weeks. The third exercised option was for one year at \$1,000.00 per week for a minimum of forty weeks, and the fourth exercised option

(which is still in effect) is for one year at \$1,500.00 per week for a minimum of forty weeks. The next option calls for one year at \$2,000.00 per week, the next for one year at \$2,500.00 per week and the next for one year at \$3,000.00 per week.

Universal has paid to Cummings in addition to the salaries paid him under his contract the following bonuses in connection with his services in the following pictures:

“Free and Easy”—1941—\$2,500.00

“The Devil and Miss Jones”—1941—\$2,500.00

“Moon Over Miami”—1941—\$2,500.00

“It Started With Eve”—1941—\$2,500.00

“Kings Row”—1941—\$2,500.00.

“Saboteur”—1942—\$7,500.00

“Between Us Girls”—1942—\$7,500.00

“Princess O’Rourke”—1942—\$7,500.00

“Flesh and Fantasy”—1943—\$7,500.00

Cummings has filed an affidavit which purports to have been sworn to on October 23, 1943, and is filed “Re Preliminary Injunction.” Universal denies each and all of the statements made in the affidavit on page 2, lines 18 to 28 inclusive, and I assert that Cummings has never at any time during the existence of his contract with Universal [93] performed or appeared on a radio program to the knowledge of Universal without the latter’s consent. Universal is entitled to the exclusive services of Cummings, including radio services, under its contract with him and of course the appearance of Cummings on

radio programs without Universal's consent would interfere with and impair the contractual rights of Universal, and if Universal, as Cummings asserts, never made such a claim to him, it was because Universal was ignorant of the fact which now appears for the first time that Cummings violated his contract on a number of occasions by appearing on radio programs without Universal's consent. There need be no reply to the statements made on page 3 of Cummings' affidavit which I have just referred to, lines 9 to 32 inclusive, and lines 1 to 5 inclusive on page 4 for the reason that Cummings did not appear in the Lux Theatre of the Air radio program on October 25, 1943.

Since April 10, 1943, Cummings has not at any time nor has anybody on his behalf made any request, either prayerful or otherwise, to Universal or to anybody acting in its behalf, to use the services of Cummings, but on the contrary Universal has notified Cummings repeatedly, as will appear from the exhibits attached to Cummings affidavit of October 23, 1943, that Cummings would be under suspension during the continuance of his failure, refusal and/or neglect to perform his obligations under the contract. I know of nothing which would have prevented Cummings at any time upon the receipt of such a notice from informing Universal that he was ready to resume the performance of his services under his contract. Instead of so informing Universal, however, he notified Universal by his telegram dated May 29, 1943, a copy of which appears on page 7 of his complaint herein as follows: "That I Elect to and Do Hereby Terminate

Said Contract by Reason of Such Failure [94] and Refusal." That, of course, was a notice to Universal that Cummings did not intend to render any further services for it as a motion picture actor under the employment contract of November 21, 1938.

Daniel J. Kelley

Daniel J. Kelley

Subscribed and sworn to before me this 1st day of November, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [95]

[Title of District Court and Cause.]

AFFIDAVIT OF HERMAN D. COOK
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California
County of Los Angeles—ss.

I, Herman D. Cook, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mentioned herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [96] to as Universal), as Assistant Paymaster; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal.

Herman D. Cook
Herman D. Cook

Subscribed and sworn to before me this 22nd day of
October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [97]

[Title of District Court and Cause.]

AFFIDAVIT OF H. S. BREWSTER
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, H. S. Brewster, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mention herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [98] to as Universal), as Assistant Treasurer and Studio Comptroller; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal from me or to my best knowledge from any person under my supervision.

H. S. Brewster

H. S. Brewster

Subscribed and sworn to before me this 22nd day of October, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [99]

[Title of District Court and Cause.]

AFFIDAVIT OF IVAN BETTS
ON APPLICATION FOR INJUNCTION AND
AGAINST MOTION FOR JUDGMENT

State of California

County of Los Angeles—ss.

I, Ivan Betts, being first duly sworn, depose and say:

That I am a resident of the County of Los Angeles, State of California, and that I am and at all times mentioned herein was employed by Universal Pictures Company, Inc., a Delaware corporation, the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred [100] to as Universal), as Assistant Studio Comptroller; that at no time since April 12, 1943, has Robert Cummings, the plaintiff and cross-defendant herein, or anyone in his behalf, requested or demanded payment of any sums purported to be due him under the terms of his contract with Universal from me or to my best knowledge from any person under my supervision.

Ivan Betts

Ivan Betts

Subscribed and sworn to before me this 22nd day of October, 1943,

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 2, 1943. [101]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD MUHL

State of California

County of Los Angeles—ss.

I, Edward Muhl, being first duly sworn, depose and say:

That I am the Assistant Secretary of Universal Pictures Company, Inc., the defendant and cross-complainant in the above entitled matter (which will hereinafter be referred to as Universal) and that I am now and at all times herein mentioned have been employed by Universal at their studios [102] located at Universal City, California. Universal has at all times since Cummings' suspension and both prior and subsequent to the receipt of the notice from Cummings by which he purported to terminate his employment contract with Universal (said notice being a telegraphic communication dated May 29, 1943, which is set forth in plaintiff's complaint at page 6, lines 18 to 32 inclusive, and page 7, lines 1 to 25 inclusive), in good faith believed and understood that the plaintiff would not and did not intend to render services for Universal and that at no time was any official of Universal informed by Cummings or by anyone on his behalf that he was desirous of working or wanted his pay check nor did anything come to the attention of Universal which would indicate anything but that Cummings would continue to persist in his refusal to work. If Universal had been advised at any time that Cummings desired or was willing to work and resume his obligations under the employment contract, Universal would have paid him and would not have kept the suspension in force.

Prior to the receipt of the notice sent by Robert Cummings referred to above, I had a telephone conversation with Oscar Cummins, the attorney and personal repre-

sentative of the plaintiff, on March 28, 1943, at or about ten A. M. of said day. I told Oscar Cummins that I had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it. Oscar Cummins stated that he hadn't heard anything about it, but that P-R-C, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him. He asked me what had disturbed me about it and I replied that I [103] wasn't disturbed, but that I had wanted to know if anybody had suggested to M-G-M that Cummings' suspension had been terminated. Mr. Cummins told me that he was positive that no such thing had occurred.

A letter dated July 6, 1943, written over the signature of 1st Lt. J. W. Gilges, an intelligence officer attached to the Seventh Army Air Force Flying Training Detachment at Oxnard, California, requesting certain information regarding Cummings, was received by Universal. From the contents of this letter we had reason to believe and still believe that Robert Cummings applied for enlistment in some capacity in the Army Air Forces. The Los Angeles Times carried a news item dated July 17, 1943, that Cummings "now is serving as an instructor for the Army Air Force cadets at the Mira Loma Flight Academy Cummings was sworn into the Air Force Reserve this week and had been assigned to his first class of cadets."

Universal has no knowledge that a demand was made for a check for Robert Cummings any time since his suspension. It has been and still is customary that when-

ever a check is not ready for contract employees at the cashier's window, an inquiry is made to the Contract Department, which is under my direct supervision and control, and no such inquiry was made to me, nor to anyone in my department. In the past when any question arose as to the amount due Mr. Cummings, Oscar Cummins invariably contacted me. In this particular instance he did not do so. H. S. Brewster, Ivan Betts, B. W. Steinberg and Herman Cook, whose affidavits are on file herein, are the only persons in charge of the payment of salaries. Universal does not have a "cashier" in the ordinary sense of the word. The person who is often referred to as the "cashier" has no more authority with reference to the payment of salaries than to [104] deliver a check when it is ready. If Robert Cummings or his secretary spoke to the "cashier" as he avers in his affidavit, then it was to a person with no more authority than a clerk whose duty is and was to merely deliver the checks if already drawn. It was never reported to any of these men or to any other official of the studio that any such request for payment had been made. A thorough inquiry has been made in the office through which checks are paid, and we are unable to find anyone who has any knowledge whatever of any alleged demand for a check for Cummings since his suspension.

Edward Muhl (signed)
(Edward Muhl)

Subscribed and sworn to before me this 3rd day of November, 1943.

(Seal)

John S. Lawton

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 29, 1945.

[Endorsed]: Filed Nov. 4, 1943. [105]

[Title of District Court and Cause.]

SUPPLEMENTARY AFFIDAVIT OF OSCAR R.
CUMMINS IN SUPPORT OF MOTION FOR
JUDGMENT AND AGAINST APPLICATION
FOR INJUNCTION.

State of California
County of Los Angeles—ss.

Oscar R. Cummins, being first duly sworn deposes and
says:

That he has read the affidavits of Daniel J. Kelley,
Ivan Betts, H. S. Brewster, B. W. Steinberg and Herman
D. Cook, filed for and on behalf of the defendant and
cross-complainant, Universal Pictures Company, Inc.

Affiant avers that he has read the affidavit of [106]
B. W. Steinberg who avers that he is the Paymaster
of the defendant corporation, and “that at no time since
April 12, 1943, has Robert Cummings, the plaintiff and
cross-defendant herein, or anyone in his behalf, requested
or demanded payment of any sums purported to be due
him under the terms of his contract with Universal from
me or to my best knowledge from any person under
my supervision.” Affiant avers that the foregoing quoted
and underlined sworn statement of said B. W. Steinberg
is false.

Affiant avers that it was affiant's custom on Wednes-
days of each week when plaintiff was not on lay-off to
pick up the check of the plaintiff, Robert Cummings, at
the cashier's window at Universal Studios, the defendant
and cross-complainant's place of business; that said check

was always present at said cashier's window without the necessity of making "demands" upon any of the executives of the defendant corporation.

Affiant avers that on or about May 26, 1943, affiant called personally at the cashier's window at Universal and that affiant was informed in words and substance that there was no check for Robert Cummings, the plaintiff. Affiant avers that to make sure of the position which the defendant corporation was taking with regard to the plaintiff, affiant personally saw B. W. Steinberg, defendant's Paymaster, and asked said Steinberg for Robert Cummings' check which was due to the plaintiff Cummings for the period after May 18, 1943; that said B. W. Steinberg stated to your affiant at said time and place in words and substance as follows: "I have no check for Bob Cummings; he's still on suspension."

Further deponent saith not.

Oscar R. Cummins

Subscribed and sworn to before me this 2nd day of November, 1943.

(Seal)

Elf Scharlin

Notary Public in and for the County of Los Angeles,
State of California.

[Affidavit of Service by Mail.]

[Endorsed]: Filed No. 4, 1943. [107]

[Title of District Court and Cause.]

AFFIDAVIT OF BELLA MARCO IN SUPPORT
OF MOTION FOR JUDGMENT AND AGAINST
APPLICATION FOR INJUNCTION.

State of California

County of Los Angeles—ss.

Bella Marco, being first duly sworn deposes and says:

That she is employed by Oscar R. Cummins, attorney, with offices in the California Bank Building, 9441 Wilshire Boulevard in the City of Beverly Hills, County of Los Angeles, California. That she has been and is presently secretary to Oscar R. Cummins since May 2, 1942.

That on or about the 27th day of May, 1943, affiant, at [108] the request of said Oscar R. Cummins, telephoned STanley 71211 and asked for the cashier's office. Your affiant avers that at said time and place affiant stated to Mr. Cummins in words and substance as follows: "I have Universal on the line," to which Mr. Cummins replied, "I am listening, Bella," at which affiant recognized that said Oscar R. Cummins was listening-in on the telephone extension.

Your affiant avers that she inquired in words and substance as follows: "Cashier's office, please." Your affiant avers that she was then connected with said cashier's office of Universal Studios and that she then inquired in words and substance as follows: "Is Robert

Cummings' check ready?" to which the gentleman in the cashier's office of defendant Universal replied in words and substance as follows: "There is no check for Bob; he's still on suspension."

Further deponent saith not.

BELLA MARCO

Subscribed and sworn to before me this 3rd day of November, 1943.

(Seal)

LEO K. GOLD

Notary Public in and for the County of Los Angeles,
State of California.

Received copy of the within Affidavit this 4th day of November, 1943. Loeb and Loeb, by E. Evans, Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed Nov. 5, 1943. [109]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES A. SMITH IN SUPPORT
OF MOTION FOR JUDGMENT AND AGAINST
APPLICATION FOR INJUNCTION.

State of California

County of Los Angeles—ss.

James A. Smith, being first duly sworn deposes and says:

That he is a resident of the County of Los Angeles, California, and has been since the year 1939. That on or about the 1st day of September, 1939, he was employed by Robert Cummings in the capacity of man servant, and has ever since then been employed by said Robert Cummings in like capacity. [110]

Affiant avers that on or about the 27th day of May, 1943, Miss Bella Marco, secretary of Mr. Oscar R. Cummins, telephoned your affiant and asked your affiant to go over to Universal Studios to the Paymaster and ask for the check due to Robert Cummings, affiant's employer.

Your affiant avers that it was his custom, from time to time, to pick up the check of his employer, Robert Cummings, at said Universal Studios, when said check was not picked up by Mr. Oscar R. Cummins.

Your affiant avers that he did not go over to Universal Studios, but instead telephoned to the Paymaster of Universal Studios, dialing STanley 71211, and asking for the Paymaster.

. Your affiant avers that the gentleman who answered the telephone stated that he was the Paymaster. Your affiant avers that when your affiant inquired who was speaking, that the voice on the other end of the telephone stated in words and substance as follows: "This is the Paymaster speaking," giving his name, which at this time affiant does not remember.

Affiant avers that he stated in words and substance as follows: "Has Robert Cummings' check been picked up as yet?" to which the person who stated that he was the Paymaster responded in words and substance as follows: "According to our records, he's under suspension."

Further deponent saith not.

JAMES A. SMITH

Subscribed and sworn to before me this 3rd day of November, 1943.

(Seal)

Leo K. Gold

Notary Public in and for the County of Los Angeles,
State of California.

Received copy of the within Affidavit this 4th day of November, 1943. Loeb and Loeb, by E. Evans, Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed Nov. 5, 1943. [111]

[Title of District Court and Cause.]

AFFIDAVIT OF OSCAR R. CUMMINS IN
RESPONSE TO AFFIDAVIT OF EDWARD MUHL

State of California

County of Los Angeles—ss.

Oscar R. Cummins, being first duly sworn deposes and says:

That he makes this supplementary affidavit in order to answer various statements contained in the affidavit of Edward Muhl.

Affiant avers that the conversation referred to in the affidavit of Edward Muhl, lines 19 to 23, did not take place on March 28, 1943, but in truth and in fact took place after the conclusion of the picture "Fired Wife," viz., sometime in April, 1943.

Your affiant further avers that the allegations of Edward Muhl in his affidavit, lines 23 to 31, are inaccurate in that at said time and place, viz., after the conclusion of the production of the motion picture "Fired Wife," sometime in April, 1943, said Edward Muhl inquired of your affiant in words and substance whether or not affiant had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, to which your affiant replied that he had not heard about it; your affiant did inform said Edward Muhl that P-R-C, a producing organization, had called affiant and asked whether or not

Robert Cummings was available [112] for the making of a motion picture with that organization.

Your affiant avers that the conversation to which said Edward Muhl refers (lines 28 to 31, page 2 of his affidavit), viz., "and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him," is inaccurate in that it was said Edward Muhl who made that statement to your affiant in the first place, and in the second place, said conversation took place subsequent to May 29, 1943, after plaintiff had terminated his contract with the defendant corporation.

Your affiant avers, in answer to that portion of the affidavit of Edward Muhl on page 3 thereof, lines 18 to 24 inclusive, that your affiant had a conversation at Universal Studio with the said Edward Muhl after the termination of the contract by the plaintiff, at which time and place the said Edward Muhl stated to your affiant in words and substance as follows: "Why didn't you ask me for Bob's (Cummings) check?"

Affiant avers that the statement in the affidavit of Edward Muhl on page 3, beginning on line 24: "In the past when any question arose as to the amount due Mr. Cummings, Oscar Cummins invariably contacted me," is true to this extent only: That when there was a question concerning the Amount Due, affiant did contact

Edward Muhl, but affiant never contacted Edward Muhl or any other executive to obtain the weekly check of the plaintiff which was due under the contract, but on the contrary, merely called at the cashier's window.

Affiant avers that Robert Cummings enlisted in the Reserves of the Army Air Force on July 14, 1943, under enlistment number 3970-3087, approximately six (6) weeks after the cancellation of his contract with the defendant corporation.

Further deponent saith not.

OSCAR R. CUMMINS

Subscribed and sworn to before me this 4th day of November, 1943.

(Seal)

LEO K. GOLD

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Nov. 5, 1943. [113]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

The permission of the Court first had and obtained, defendant hereby amends its answer to the complaint of plaintiff by adding thereto the following:

I.

On April 10, 1943, defendant delivered to plaintiff the following telegram:

"You are hereby instructed to report to us at our studio at Universal City, California, at the office of Mr. [121] Dan Kelley at ten o'clock Monday morning, April 12th for the rendition of your services under your contract of employment with us dated November 21, 1938, as heretofore *amendea dne xtended* in connection with the portrayal of a role in our photoplay now entitled 'Fired Wife' and/or the rendition of such other services as we may require under said contract as amended and extended."

Plaintiff failed, neglected and refused to report pursuant to said telegram, or in any manner or at all.

LOEB AND LOEB

By GRANT B. COOPER

Grant B. Cooper

Attorneys for Defendant and Cross-
Complainant [122]

[Verified.]

[Endorsed]: Filed Dec. 22, 1943. [123]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the above-named parties by and through their respective counsel:

1. Allegation I of the complaint is admitted.
2. With respect to allegation II it is admitted that a contract between plaintiff and defendant was executed on November 21, 1938, which is the contract annexed to the complaint and marked Exhibit A, and that various amendments to said contract have [124] been executed, which amendments are attached to this stipulation and Marked Exhibit A.
3. Allegation III of the complaint is admitted; provided, however, that defendant reserves the right to offer proof of the full nature of the demand, to wit, proof of the sending of the telegram of April 10, 1943, which has been made a part of Amendment One to defendant's Answer, which Amendment One has already been, pursuant to stipulation of counsel, filed in this case.
4. Allegation IV of the complaint is admitted except that the role of "Hank" was completed on May 19, 1943 instead of on May 18, 1943, as alleged.
5. With respect to allegation V of the complaint it is admitted that the written notice pleaded therein and dated May 18, 1943, was sent by defendant and received by plaintiff.
6. With respect to allegation VI it is admitted that between the dates of April 10, 1943 and May 18, 1943, both inclusive, defendant did not send, nor did plaintiff receive, any written notices of any kind or nature other

than those heretofore admitted; to wit April 10, April 15, May 18, 1943.

No written demand was made by defendant at any time after April 10, 1943 (other than the telegram of April 10, 1943) that plaintiff report to defendant in connection with any picture other than "Fired Wife" or for any services pursuant to said contract.

7. With respect to allegation VII defendant admits that Exhibit A attached to said complaint provides that any compensation due plaintiff was, and is payable on Wednesday of each week for services rendered up to and including the Saturday preceding, and defendant further admits that it failed to pay any salary to plaintiff on May 26, 1943, and has failed to pay any salary to plaintiff since said date and further that no one on behalf of defendant has paid any salary to plaintiff at any time. [125]

8. With respect to allegation VIII it is admitted that on May 29, 1943, plaintiff sent, and defendant received, the notice set forth in haec verba in allegation VIII.

9. With respect to allegation IX it is admitted that on or about June 2, 1943, defendant sent, and plaintiff received, the notice set forth in haec verba in allegation IX.

10. With respect to allegation X it is admitted that since May 29, 1943, there has been an interchange of notices and letters from defendant to plaintiff and from plaintiff to defendant the purport of which is that defendant claims that said contract still exists and subsists between plaintiff and defendant, and plaintiff claims that said contract, by reason of the material breach of defendant as herein alleged, has been terminated by plaintiff as of May 29, 1943, and no longer exists between them. In this connection it is further admitted that all of the writ-

ten notices which are appended to, and made a part of the complaint of plaintiff, the answer and/or amended answer of defendant, the affidavit of plaintiff filed in connection with the Motion for Summary Judgment and the Motion for Temporary Restraining Order may be considered as authentic and as having been sent by defendant and received by plaintiff, or sent by plaintiff and received by defendant, as the case may be. It is further admitted that since the filing of the above action defendant has sent, and plaintiff has received, two other notices dated respectively November 15, 1943 and December 20, 1943, both of which are appended hereto and marked Exhibit B.

11. Oscar Cummins was at all times mentioned in the complaint or any of the pleadings the agent and representative of Robert Cummings and was duly authorized by plaintiff to talk and act in all matters in which he purported to or did talk or act.

12. No lay-off time was available to defendant at the time plaintiff was placed upon suspensions and none of the [126] suspensions ordered by defendant were ordered because of any lay-off time to which defendant was entitled.

Counterclaim of Defendant and Answer Thereto

1. The admissions already made by the answer of plaintiff to the counterclaim of defendant are accepted and stipulated to as facts.

Fourth Cause of Action

1. Reference in allegation I of the fourth cause of action to the repleading of paragraphs II to IV, both inclusive, of the third cause of action in the complaint is hereby eliminated.

2. The admissions of the answer to the fourth cause of action of the complaint are accepted and stipulated to as facts.

All stipulations of fact herein made are not limited to the causes of action or particular pleading under which they are herein classified but may be used for all purposes as facts on any and all issues arising and tried in the action.

Neither party shall be limited to or circumscribed in its or his right to object to the materiality of any of the foregoing stipulated facts, and further neither party is precluded from adding to or enlarging upon the facts stipulated to, all subject to law and the rules of evidence.

In the event any facts herein stipulated should be at variance with the truth, either party shall have the right to submit evidence at any time before the conclusion of the trial to show the truth. To the best knowledge and belief of each of the parties the facts as herein stipulated to are completely accurate. [127]

ROTH AND BRANNEN and
JOSEPH J. CUMMINS

By Roth

Attorneys for Plaintiff and
Cross-Defendant.

LOEB AND LOEB

By.....

Attorneys for Defendant and
Cross-Complainant. [128]

EXHIBIT A

Universal City, California
January 30, 1941

Mr. Robert Cummings
c/o Universal Pictures Company, Inc.
Universal City, California

Dear Mr. Cummings:

This is to confirm our advice to you that commencing with the photoplay of Loew's Incorporated now entitled "Free and Easy" in which you rendered services and continuing until further notice to you, we will pay you, conditioned always upon the full and complete performance by you of each and all of your obligations and agreements under your contract of employment with us dated November 21, 1938, as heretofore extended, a bonus of Twenty-five Hundred Dollars (\$2500.00) for each complete photoplay in which a role is portrayed and completed by you.

You hereby acknowledge and agree that the payment of each bonus herein provided for is and will be entirely voluntary on our part and that accordingly we may suspend the payment of any bonus to you or decrease or increase the amount thereof or we may at any time at our option and in our sole judgment and discretion discontinue the payment of any further bonus or bonuses to you without liability to you.

You further acknowledge and agree that neither the execution of this agreement nor the payment of any bonus

to you shall change, alter, amend or affect said contract of November 21, 1938 in any manner or particular whatsoever.

Concurrently with the execution hereof we have paid you the sum of Twenty-five Hundred Dollars (\$2500.00), being the bonus herein provided for with respect to said photoplay now entitled "Free and Easy," receipt of which sum is hereby acknowledged by you. [129]

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Yours very truly,

UNIVERSAL PICTURES COMPANY, INC.

By CLIFF WORK (Signed)

Vice-President

And EDWARD MUHL (Signed)

Assistant Secretary

Approved and Accepted:

ROBERT CUMMINGS (Signed)

(Robert Cummings) [130]

Universal City, California

January 31, 1941

Mr. Robert Cummings

c/o Universal Pictures Company, Inc.

Universal City, California

Dear Mr. Cummings:

This will confirm the following agreement between us with reference to your contract of employment with us dated November 21, 1938, as heretofore extended:

1. We agree that during the period from the date of this agreement to the expiration of the present term of your employment under said contract (to wit, the period of employment provided for in subdivision (b) of paragraph 23 of said contract), the time during which you may be laid off without pay as provided for in paragraph 22 of said contract shall not exceed an aggregate period of two (2) weeks. It is agreed, however, that if during said period you shall be laid off without pay in such manner that the remaining unused portion of said aggregate period of two (2) weeks shall be less than a full week, we may, nevertheless, lay you off without pay for the full unused portion of said aggregate period of two (2) weeks to the end that we shall in any event be entitled to lay you off without pay during the afore-said period for an aggregate period of two (2) full weeks, notwithstanding that the last portion of said lay-off may be for less than a week.

2. In the event of the exercise by us of any one or more of the options granted us under the terms of subdivisions (c) to (g) inclusive, of paragraph 23 of said contract of November 21, 1938 (there being no obligation whatever upon us to exercise any of said options), we agree that during the period of employment provided for in each respective subdivision of said paragraph 23, you shall be entitled to one (1) vacation of at least four (4) consecutive weeks, and that during at least two (2) weeks of each [131] said vacation compensation shall be payable to you under said contract (the exact period or periods during which compensation shall be so payable to be specified by us), and that except for the aforesaid requirement that compensation be payable to you under said contract during at least two (2) weeks of said vacation, the remaining portion or portions of said vacation may occur at a time or times when you are laid off without pay. It is, of course, understood that you shall not have the right during said vacation to render any services of any kind for yourself or for any person, firm or corporation other than ourselves without our written consent first had and obtained. The time at which you are to take said vacation shall be designated by us, it being expressly understood that we shall not be precluded by the designation of a date for the commencement of said vacation from thereafter changing said date at any time to an earlier or later date.

3. It is expressly understood that each and all of the obligations and agreements on our part herein set forth are conditioned upon the full and complete per-

formance by you of each and all of your obligations and agreements under said contract of November 21, 1938, and that in the event of a breach by you of any of said obligations and/or agreements we shall have the right to terminate this present agreement without prejudice to any rights or remedies which we may have under said contract of November 21, 1938, or at law or in equity.

4. Except as hereinbefore expressly provided, said contract of November 21, 1938 is not modified or amended in any manner or particular whatsoever.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance in [132] the space hereinbelow provided.

Yours very truly,

UNIVERSAL PICTURES COMPANY, INC.

By CLIFF WORK (Signed)

Vice-President

(C.S.)

And EDWARD MUHL (Signed)

Assistant Secretary

Approved and Accepted:

ROBERT CUMMINGS (Signed)

(Robert Cummings) [133]

Universal City, California
December 31, 1941

Mr. Robert Cummings
c/o Universal Pictures Company, Inc.
Universal City, California

Dear Mr. Cummings:

This will confirm our agreement that commencing with the photoplay now entitled "Saboteur", and continuing until the expiration of your contract of employment with us dated November 21, 1938, as amended, we will pay you a bonus of Seven Thousand Five Hundred Dollars (\$7500.00) for each complete photoplay under said contract of employment in which a role is portrayed and completed by you.

Payment of said bonus shall be conditioned upon the full and complete performance by you of each and all of your obligations and agreements under said contract of employment, as amended.

This agreement replaces that certain agreement between us dated January 30, 1941, said agreement of January 30, 1941 being hereby terminated effective immediately.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By CLIFF WORK (Signed)

Vice President

(Corporate Seal)

And EDWARD MUHL (Signed)

Assistant Secretary.

Approved and Accepted:

ROBERT CUMMINGS (Signed)

(Robert Cummings) [134]

EXHIBIT B

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

November 15, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks commencing October 11, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary [135]

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

December 20, 1943

Registered Mail

Mr. Robert Cummings
c/o Mr. Oscar Cummins
9441 Wilshire Boulevard
Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks commencing November 16, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl

Assistant Secretary

Edward Muhl
jab/j

[Endorsed]: Filed Dec. 30, 1943. [136]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer, December 31, 1943

At the time defendant's original application to amend its answer was denied the court ruled that such determination was without prejudice to a further application by defendant to amend its answer, solely for the purpose of pleading the facts upon which it was asserting that plaintiff had misled defendant to its prejudice by reason of certain representations claimed to have been made by him and his agent. Within the time allowed defendant has tendered a proposed second amendment to its answer.

In the proposed amendment defendant has alleged, among other matters, that from time to time during the period extending from about April 5, 1943 to and including May 28, 1943 plaintiff either in person or through his agent represented to defendant that he would join a certain branch of the military service for the duration of the war, and that for that reason would not report at defendant's studio to portray a certain role which it had requested him to portray in a certain photoplay; also that on April 13, 1943, defendant notified plaintiff's agent that it had received the aforementioned information from plaintiff, that the latter had refused to report on April 12, 1943, [137] that at the same time defendant informed plaintiff's agent of its intention to suspend plaintiff from the payroll as of the date last mentioned, and that plaintiff's agent informed defendant that its action was proper

and in addition that he was endeavoring to have plaintiff come to defendant's studio to discuss the situation. Likewise in said pleading defendant has asserted that as late as May 28, 1943 plaintiff continued to lull it into the belief that he was not holding himself available for services under the contract sued upon and was not demanding compensation but on the contrary he informed defendant that he was engaged in work connected with establishing an air shuttle service and that anyone wanting him would have to consult General Arnold of the Army Air Corps. It is further pleaded in said amendment that at no time since April 10, 1943 did plaintiff intend to fulfill the terms of his contract, that on the contrary, at all times since said date he has devoted himself exclusively to the work of the Civil Air Patrol and as an instructor for the Army Air Force Cadets, and that particularly since July 16, 1943 he has been a member of the Air Force Reserve of the United States Army. Defendant has also charged in said amendment that plaintiff's alleged demands for payment of compensation, if any occurred, were made in bad faith.

If the theory of the aforementioned amendment to the answer be that plaintiff not merely asserted that he would be unable or would refuse to perform his contract in a specific respect, but that he was guilty of a distinct and unequivocal, absolute refusal to perform the whole contract, or of a covenant going to the whole consideration, at least for [138] the duration of the war, and that because of such refusal on his part defendant had exer-

cised its right of suspension under the contract and had refused to pay any compensation to him, then we are inclined to hold that such allegations, when established by the evidence, would constitute a defense to the present lawsuit. Exactly what defendant expects to prove is not wholly clear from the proposed amendment.

Plaintiff opposes the allowance of such amendment, and has urged that the course of conduct pursued by defendant, as indicated in its various notices to the plaintiff, has been inconsistent with and contradictory to the position defendant now seeks to take under said pleading. While there is much to be said in support of plaintiff's contention, nevertheless, we are persuaded that defendant should be allowed to make as complete a record as the facts warrant, and that upon the close of the evidence the court will be required to determine what legal conclusions should be drawn therefrom. Accordingly defendant should be allowed to file the proposed second amendment to the answer.

Minute Order

For the reasons set forth in the memorandum of conclusions this day filed It Is Ordered that defendant's proposed second amendment to its answer be filed.

[Endorsed]: Filed Dec. 31, 1943. [139]

[Title of District Court and Cause.]

PROPOSED SECOND AMENDMENT TO
ANSWER

Defendant hereby amends its answer to the complaint of plaintiff, by adding thereto the following:

I.

Before April 3, 1943, defendant had informed plaintiff that he was to be assigned, and had been assigned, to portray the role of Hank in a forthcoming production to be produced by defendant and then entitled "Fired Wife." On or about April 3, 1943, plaintiff notified defendant that he was on the verge of [140] refusing to do the part in the picture "Fired Wife" partly because he was unhappy about the selection of the director and partly because he was seriously thinking of signing up with the Civil Air Patrol or the Army for the duration of the war. On or about April 5, 1943, plaintiff notified defendant that he had made up his mind not to do the picture because he felt that it was his duty to give one hundred percent of his time to war work and that he was signing up with the Civil Air Patrol for the duration. Before said notification defendant was aware of the fact that plaintiff was a flyer, devoted part of his time to the Civil Air Patrol and on occasions wore the uniform of the Civil Air Patrol.

II.

On April 10, 1943, defendant delivered to plaintiff the telegram set forth in paragraph I of its first amendment to its answer on file herein.

III.

On April 13, 1943, defendant notified plaintiff's exclusive agent, personal representative and lawyer, Oscar Cum-

mins, that defendant had theretofore been informed by plaintiff personally that he, plaintiff, was going to join, or had joined, the Civil Air Patrol for the duration and would not report for his role in the production of the photoplay "Fired Wife"; that plaintiff had failed, neglected and refused to report on April 12, 1943, pursuant to defendant's telegram of April 10, 1943, and that defendant, to establish a clear position, intended to suspend plaintiff from the payroll as of that date. Said Oscar Cummins, acting in the capacity of plaintiff's exclusive agent, personal representative and lawyer, at said time informed defendant that such action was entirely proper, and further informed defendant that he, the said Oscar Cummins, was endeavoring to have plaintiff come in to defendant's studio to discuss the situation with [141] defendant's assistant secretary and casting director.

IV.

On April 15, 1943, defendant delivered to plaintiff the notice set forth in paragraph III of the first alleged cause of action in plaintiff's complaint. Plaintiff failed and neglected to report or respond in any manner at all to said notice.

V.

On May 18, 1943, plaintiff continued to fail and neglect to report or respond to defendant's notices of April 10 and April 15 in any manner, or at all. As a direct result of all of plaintiff's representations and conduct as hereinbefore set forth defendant believed that it was plaintiff's intention to devote one hundred percent of his time to the Civil Air Patrol of the United States Army, or other similar pursuits other than his obligations under the contract and would not report to defendant under the terms and provisions of said contract, or at all, and

believed that it would be a useless and idle act to make plans and expend money for the preparation of productions and roles in which plaintiff's unique and artistic talents would fit, and believed that it would be a useless and idle act to offer further roles to plaintiff until plaintiff notified defendant that he had changed his plans or was willing to comply with the terms and conditions of his contract.

VI.

Relying on the representations and conduct of plaintiff, as hereinbefore set forth, defendant did not make plans and did not expend any money for the preparation of productions and roles in which plaintiff's unique and artistic talents would fit, and did not offer further roles to plaintiff, and relying and acting on plaintiff's representations and conduct, as hereinbefore set forth, and to protect its rights under the contract, defendant [142] served and delivered the notice of May 18, 1943, as set forth in paragraph IV of the first alleged cause of action in plaintiff's complaint. On May 18, 1943, the services of the substitute for plaintiff in the portrayal of the role "Hank" in the production of the photoplay "Fired Wife" were completed.

VII.

Plaintiff, with knowledge of all the matters hereinbefore set forth and with knowledge that defendant was at all times ready, willing, able and anxious to use his said services and to fulfill its obligations under the contract, made his alleged demands for payment of compensation, if any such demands were made, designedly and in bad faith to employees of defendant who had neither the authority nor the duty to refuse to pay, to order payment of compensation or to communicate any demand

for payment to any of the officers or employees of defendant having such authority. If any such demand was made, no officer nor employee having authority to order payment of compensation, to refuse payment of compensation or to communicate any such demand was ever notified as alleged in paragraph VII of plaintiff's complaint, or in any manner or at all.

VIII.

Never at any time after April 5, 1943, was defendant aware, nor did defendant believe that plaintiff was holding himself available or in readiness to perform any of his obligations under his contract, and defendant at all times was ready, able, willing and anxious to use his services and to pay therefor in accordance with its contract.

IX.

Before plaintiff's notice of May 29, 1943 claiming defendant's breach of the contract for nonpayment of compensation, as alleged in paragraph VIII of plaintiff's first alleged cause of action in his complaint herein, and on May 27 and May 28, 1943, [143] plaintiff acting through his exclusive agent, personal representative and lawyer continued to lull defendant into the belief and reliance that plaintiff was not holding himself available for services under his contract and was not demanding compensation, but specifically informed defendant, and he did inform defendant, among other things, that plaintiff was engaged in work in connection with the establishment of an air shuttle service and if anyone wanted him, they would have to see General Arnold of the Army Air Corps to get him.

X.

Defendant is informed and believes, and upon such information and belief alleges, that at no time since April 10, 1943, did plaintiff intend to fulfill the terms and provisions of his contract and at all times since said date was devoting all of his time to the Civil Air Patrol and as an instructor for the Army Air Force Cadets at Mira Loma Flying Academy, Seventh Army Air Forces Flying Training Detachment at Oxnard, California, and since July 16, 1943, has been a member of the Air Force Reserve of the United States Army.

XI.

Defendant at all times herein would have respected, and now respects, any patriotic motive and desire on the part of plaintiff to serve his country. Defendant, however, has at all times objected, and now objects, to plaintiff's rendering his services as an actor or in any other capacity set forth in the contract to persons, firms or corporations other than defendant contrary to the terms and provisions of paragraph 3 of the contract and any other provision of said contract.

XII.

Plaintiff is wholly without equity because of all the facts hereinbefore alleged to invoke the aid of this Court to terminate and rescind his obligations to perform the contract, and [144] is in default of performance thereof.

XIII.

Plaintiff is estopped to claim a breach of the contract on the part of defendant because of all of the facts hereinbefore alleged and is wholly without equity to invoke the aid of this Court to terminate and rescind his obligations to perform the contract.

XIV.

Defendant is now willing, and now offers, to do full equity by plaintiff to fully pay and restore to plaintiff any sum or sums of money or compensation this Court may find due to plaintiff by virtue of any mistake of fact, mistake of law, or for any other reason hereinbefore shown by the facts to have existed or now existing.

Wherefore, defendant prays:

(1) That this Court find and declare that defendant has at all times fulfilled all of the terms and provisions of the contract on its part to be performed;

(2) That this Court find and declare that plaintiff breached his contract in the manner and at the time set forth in this Amendment to Answer;

(3) That should this Court find and declare that defendant breached the contract on May 26, 1943, or at any other time, said breach in equity was not a material breach;

(4) That should this Court find and declare that defendant breached the contract on May 26, 1943, or at any other time, the Court also find and declare that plaintiff was guilty of prior breaches in the manner and at the time set forth in this Amendment to Answer, and in equity and good conscience plaintiff cannot complain or obtain relief from this Honorable Court;

(5) That should this Court find and declare that [145] defendant breached the contract on May 26, 1943, or at any other time, plaintiff is estopped by his conduct

and representations to defendant, and is wholly without equity to complain or obtain relief from this Honorable Court;

(6) That should this Court find and declare that defendant breached the contract on May 26, 1943, or at any other time, defendant be relieved of said breach and relieved of any forfeiture of any of its rights under the contract on such equitable terms as this Court may deem meet and just in the premises;

(7) That this Court find and declare that defendant is entitled to a permanent injunction herein restraining and enjoining plaintiff from rendering, offering to render or agreeing to render his services to any person, firm or corporation other than defendant until such time as he shall have complied with his obligations under the contract and shall no longer be obligated to perform services for defendant, and

(8) For costs and for such other and further relief as to this Court may seem proper or equitable.

LOEB AND LOEB

By GRANT B. COOPER
GRANT B. COOPER

Attorneys for Defendant and
Cross-Complainant [146]

[Verified.]

[Endorsed]: Lodged Dec. 22, 1943. Filed Jan. 3, 1944. [147]

[Title of District Court and Cause.]

PLAINTIFF'S TRIAL MEMORANDUM OF POINTS
AND AUTHORITIES AND ITS OBJECTIONS
TO THE PROPOSED SECOND AMENDMENT
TO DEFENDANT'S ANSWER

Plaintiff objects to the Proposed Second Amendment to the defendant's answer and makes a part of his objections filed herein the objections heretofore filed under the caption "Points and Authorities in Opposition to Motion for Permission to File Amendment to Answer" filed by plaintiff to the motion of defendant for permission to file amendment to answer, which motion was heretofore heard and denied. Plaintiff also refers to the oral discussion and argument made by plaintiff in opposition to said motion at the time of the hearing thereof. Each to wit, said "Points and Authorities in Opposition to Motion for Permission to [148] File Amendment to Answer" and the oral discussion. (reduced to Reporter's Transcript).

Plaintiff in order to make clear his reasons (legal and factual) and upon which he objects to the filing of the proposed second amendment deems it advisable to set forth the issues of law and fact; in order to avoid duplication, plaintiff (it is hoped with the court's permission and indulgence) will at this time because it is necessary so to do in connection with his objections, file his trial memorandum of points and authorities.

In the event the first cause of action is decided for plaintiff, the second cause (with limitations hereinafter stated would necessarily be decided the same way) and there would, of course, be no necessity for trial on the

fourth cause (the third cause now being eliminated) or on the counterclaim.

The issue of estoppel sought to be raised by "Proposed Second Amendment to Answer" should not be allowed because (a) it is no way germane to the issues of the case as is demonstrated by the admitted facts; (b) no issue of estoppel is properly pleaded by the allegations of the proposed second amendment and (c) even though the issue of estoppel may be properly pleaded in the proposed second amendment it is clear from the admitted facts in the record as well as from the allegations of the proposed second amendment that defendant is estopped to raise the issues of estoppel predicated upon facts it proposes to prove.

I.

The Primary Issues for Decision on the Facts and the Law

These issues were previously stated by the court in its discussion on Motion for Summary Judgment and the Motion for Temporary Restraining Order, as follows: [149]

For the plaintiff:

"The basis for the action would seem to be that the plaintiff contends, by virtue of the facts brought out in the complaint and the answer, and also somewhat amplified by the affidavits, that along sometime in May of this year he became entitled to compensation under the contract that had been entered into between the parties sometime in 1938; that even assuming that the defendant was entitled to the relief from paying him any compensation during the period required for the making of a certain pic-

ture, in the playing of which the plaintiff had refused to participate, and even assuming that the defendant was entitled to declare the contract suspended for the period referred to, that from and after the determination of such period the plaintiff was entitled to his compensation as stipulated in the contract; that the defendant having taken the position that he was not entitled to be paid for this subsequent period, and having refused to pay any compensation for this later period, the defendant has breached the contract and, therefore, the plaintiff is entitled to the benefit of the termination thereof, notice of which he has given."

For the defendant:

"The Court: Now, the defense here asserts, firstly, that no demand was made on behalf of plaintiff for compensation through the appropriate channel, but further—and this would seem to be [150] the crux of the defense—that the terms of the contract entitle the defendant to continue the suspension beyond the period previously mentioned and to continue that suspension at least until the plaintiff shall affirmatively in some manner inform it that he is prepared to resume work under the contract.

Up to this point have I correctly appraised the position of the defense?

Mr. Newmark: Yes, your Honor. There may be additional defenses in so far as the claim of breach of contract is concerned. In other words, these are our basic points that your Honor has stated, but even if it were to be held that these points were not well taken, we would still maintain that

there has been no material breach of contract or that the plaintiff is in no position to make that assertion. * * * * * But that is an alternative argument, and your Honor has stated correctly our main point."

II.

The Record

The stipulation of facts heretofore executed and which is or should be on file, all affidavits heretofore filed by either party, the pleadings, all records or minutes of the court, and specifically admissions of counsel (on both sides) made in open court. Attached hereto in the form of an appendix are excerpted the pertinent admissions of fact already in the record.

III.

The Issues of Fact [151]

A. First Cause of Action.

(1) Did plaintiff make demand for salary and did defendant refuse to pay?

(2) Did defendant make the demand of April 10, 1943 in writing by telegram (pleaded in defendant's first amendment to the answer) and did plaintiff receive the same (plaintiff admits a demand, Allegation III of Complaint).

B. Second Cause of Action will stand or fall with the first.

C. Fourth Cause of Action.

(1) Same as first cause.

(2) Proof of allegations in Paragraph II of Fourth Cause, pages 13-14 of Complaint.

IV.

Issues of Law

A. First Cause of Action.

(1) Defendant Asserts:

Under its contract it had the right to and that it did by its notices suspend the compensation of plaintiff for the period required to complete the portrayal of "Hank" in "Fired Wife" and until such time thereafter as plaintiff reported to defendant ready, able and willing to work.

Plaintiff Answers:

(i) The contract gave no such right.

(ii) Even though the contract did give such right, the facts as they existed and as they are recited in the demand of April 10th (conceding for purposes of this point that it was received in its telegraphic form) did not warrant [152] the position taken by defendant.

(iii) Even though the contract gave such a right asserted by defendant and assuming the facts warranted the position taken by the defendant, defendant elected a specific right in its notices and deliberately limited its right of suspension to a definite period. Assuming that defendant had the right it asserts and did not deliberately make an election to limit the right in its notices, defendant did nevertheless by its notices limit the right to a specific period because the notices were so ambiguous as to mislead plaintiff to his prejudice, and defendant is, therefore, now estopped to assert that it did not limit the right of suspension to a specific period.

(iv) If for a particular breach defendant instead of electing to terminate elects to suspend and extend it cannot (irrespective of any contractual terms assuming there

are such) suspend and/or extend for any period longer than the actual breach because any further suspension and extension would be in the nature of a penalty and, therefore, invalid.

(v) Assuming defendant has the contractual right it asserts, that the facts warranted its exercise, that defendant did not elect in its notices to exercise a specific right and that defendant is not estopped to deny that it exercised a specific right, plaintiff when he appeared at the office of defendant and demanded his salary [153] gave such notice as would be sufficient to a reasonably prudent person that he was reporting ready, able and willing to work.

(2) Defendant Asserts:

Assuming a breach on its part, the breach was not sufficiently material and therefore, plaintiff did not have the right to terminate his contract.

Plaintiff Answers:

The breach was a material breach sufficient upon which to predicate the termination of the contract.

(3) Defendant Asserts:

If plaintiff is correct in his statement of the law as hereinabove outlined, that plaintiff is nevertheless estopped to take advantage of his rights by reason of alleged estoppel facts pleaded in the proposed second amendment to the answer.

Plaintiff Answers:

(i) No estoppel facts exist.

(ii) No estoppel facts have been properly pleaded.

(iii) Conceding that estoppel facts do exist and that they are properly pleaded and that they are found in favor of defendant, defendant by its conduct and its notices is estopped to assert any such estoppel.

B. Second Cause of Action.

This is a money count and will be decided on the issues set forth in the first cause of action. [154]

C. Fourth Cause of Action.

Plaintiff Asserts:

Because of the facts alleged in the Fourth Cause of Action, defendant did not have the right to demand that he appear in "Fired Wife" and that his failure to appear was not a breach on the part of plaintiff but a breach on the part of defendant and that because of said breach there has been a material failure of consideration justifying the court in declaring a rescission of the contract. Defendant, of course, denies the facts and the legal position asserted by plaintiff resulting from the facts if proved.

* * * * *

Respectfully submitted,

JOSEPH J. CUMMINS
ROTH AND BRANNEN

By Lester Wm. Roth

Attorneys for Plaintiff and Cross-Defendant.

[Endorsed]: Filed Jan. 4, 1944. [181]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Hollzer's Calendar,

March 6, 1944.

This lawsuit arises out of a certain contract of employment entered into between the parties under date of November 21, 1938. The issues requiring determination are presented by the first two counts of the complaint, the answer thereto and the amendments to the answer.

Count one constitutes a cause of action for equitable relief, namely, for termination of said contract upon the ground of the alleged breach thereof by defendant in failing and refusing to pay plaintiff certain compensation claimed to be due thereunder. The second count is a cause of action for the recovery of certain compensation alleged to be owing and unpaid under the terms of said contract.

Defendant relies upon several defenses. It contends, firstly, that plaintiff breached the contract, in that he failed and refused to report at its studio on April 12, 1943, to portray a certain role in a photoplay in which he was then cast, pursuant to its telegraphic notice addressed to him under date of April 10, 1943; that by reason of said breach, defendant became entitled to, and did, exercise the right to engage another person to portray such role, and to refuse to pay plaintiff any compensation until the completion of such role by another person, also the right to extend the term of [252] said contract for a period equivalent to the time required for the completion of such role by another person, and that said role was completed by another person on May 19, 1943.

Secondly, defendant charges that plaintiff further breached the contract, in that he failed and refused to report at its studio on April 12, 1943, and at all times since has failed and refused, to render such additional services as it might require of him under the contract and pursuant to said telegraphic notice; that by reason of said breach it became entitled to, and did, exercise the further right to refuse to pay him any compensation during the period of such failure and refusal, to-wit: the period from April 12, 1943 to date and likewise became entitled to, and did, exercise the still further right to extend the term of the contract for a period equivalent to the period during which such failure or refusal has continued.

Thirdly, defendant takes the position that at and prior to the time of his failure and refusal to report at its studio on April 12, 1943 plaintiff had notified defendant to the effect that he had determined to devote 100% of his time to war work, particularly to sign up with the Civil Air Patrol for the duration of the war, and hence during such period would not engage in the work of making pictures; that therefore it became entitled to, and did, exercise the right to suspend him from the payroll, in other words, to refuse to pay him any compensation for the duration of the war; and that until plaintiff should report at its studio and notify defendant that he was ready and willing to resume work under the contract, such suspension would remain in effect indefinitely.

Fourthly, defendant contends that from time to time from about April 5, 1943 to May 28, 1943, inclusive, plaintiff either in person or through his agent, represented to it in [253] substance that he would join the military service for the duration of the war, and for that reason would not report at its studio to portray a role which he had been cast by defendant to portray in

a certain photoplay; that on April 13, 1943 defendant notified plaintiff's agent it had received the aforementioned information from plaintiff, also that he had refused to report on April 12, 1943, and that it intended to suspend him from the payroll as of the latter date; that plaintiff's agent replied that its action was proper and that he was endeavoring to have plaintiff come to its studio to discuss the situation; that plaintiff continued as late as May 28, 1943 to lull defendant into the belief that he was not available for services under the contract, but instead was engaged in work of a military character and that anyone wanting him would have to consult the head of the Army Air Corps; that at all times since April 10, 1943, plaintiff has devoted himself exclusively to the work of the Civil Air Patrol, and as an instructor for the Army Air Force Cadets, that at no time since said date did he intend to fulfill his obligations under the contract, and that ever since July 16, 1943, he has been a member of the Air Force Reserve of the United States Army; that defendant believed, relied and acted upon the aforementioned representations on the part of plaintiff to its prejudice; and hence that plaintiff is without equity and is estopped to claim that defendant breached the contract.

Fifthly, defendant argues that plaintiff further breached the contract in this: that whereas he agreed that until the expiration of the term thereof he would be "available at all times in Los Angeles, California, or at any other place the producer (defendant) may designate, unless excused in writing by the producer," (see contract, paragraph 19) plaintiff absented himself from Los Angeles County continuously [254] from May 19th to May 29th, 1943 without defendant's knowledge or consent.

Lastly, defendant urges that, if the Court should find that on May 26, 1943, compensation was owing and due from defendant to plaintiff and that by reason of its failure and refusal to pay such compensation it breached the contract, then such default resulted from an excusable mistake on its part, that it is entitled to be relieved from such default, and to that end it is willing and offers to pay to plaintiff any compensation the Court may find due him and also otherwise to do full equity.

At the opening of the trial, the Court stated, in effect, that, taking into consideration the admissions made by the pleadings and the further facts incorporated in the stipulation of facts filed herein, a prima facie case entitling plaintiff to judgment upon the first count would be established upon proving the allegations of the last sentence of paragraph VI and the allegations comprising the first sentence of paragraph VII of said count. The last sentence of Paragraph VI reads as follows:

"No demand, oral or written, was made by defendant at any time after April 10, 1943 that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract."

The first sentence of paragraph VII reads:

"On May 26, 1943, plaintiff, pursuant to the terms and provisions of said contract, appeared at the offices of the defendant and demanded of defendant payment of salary as fixed by said contract for that portion of the week beginning May 19, 1943 and ending May 22, 1943." [255]

Save in the particulars hereinafter pointed out, the evidence establishes, without substantial contradiction, the following facts. Between the date of the execution

of the contract involved herein and March 28, 1943, plaintiff had portrayed roles in at least fifteen photoplays, eleven of which had been produced by defendant, and with its consent he had appeared in additional motion pictures produced by others. Excepting the last three months of 1942, he had been occupied during at least a portion of each month of that year in performing services under said contract. During March, 1943, more particularly between the 10th and the 23rd thereof, he had portrayed a role in the last photoplay in which he worked for defendant.

Prior to February, 1943, disputes had arisen between plaintiff and defendant, particularly one of defendant's executives named Daniel Kelley, who was in charge of its creative talent, including players, writers, directors and producers. These differences arose out of complaints by plaintiff, criticising the quality of the photoplay productions in which defendant required him to appear, including such matters as the type of play, the cast and the director. About February or March of the same year, these difficulties became so acute that the relations between plaintiff and Kelley became quite strained and as a consequence the latter was replaced, so far as defendant's dealings with plaintiff were concerned, by one Robert Speers, another executive, who was defendant's casting director. Thereafter, and extending over a period of at least several weeks prior to April 10, 1943, several conversations were had between Speers and plaintiff, and the latter's agent, Oscar Cummins, some with the former and some with his agent, on the subject of defendant's proposed production of a certain photoplay [256] entitled "Fired Wife." These discussions dealt primarily with such matters as the quality of the production, the script for the same, the contemplated

cast, the type of director and the role which plaintiff would be asked to portray, namely, that of Hank.

About the first week of April, 1943, plaintiff and Speers held a lengthy conference which lasted from two to three hours, and during which the latter disclosed for the first time certain detailed information respecting said picture, particularly who had been selected to direct the making thereof and also the names of the principal members of the cast. Plaintiff took vehement exception to what he characterized as cheapening the production. He complained that the director was not qualified and was not sufficiently experienced to direct the making of a first-class photoplay, and, further, that the actress selected to portray the feminine lead and also certain other members of the cast lacked the requisite qualifications to portray the respective roles to which they had been assigned. He also charged that Speers had represented to him that the photoplay would be produced as a Class A or highest quality picture in every respect; that the picture would be directed by an outstanding director in the motion picture industry, comparable to one Leo McCarey, that the feminine lead would be portrayed by Teresa Wright and that other principal parts would be portrayed by Charles Coburn and Eddie "Rochester" Anderson, all being outstanding artists in said industry. He also insisted that relying upon such representations he had consented to portray the role of Hank in the picture and that the proposed production as finally then being disclosed to him was a repudiation of such representations. He pointed out that he was a professional flyer, as well as a professional actor; [257] that the services of the former were then greatly in need and that rather than waste his time making a motion picture, which he did not feel would do anything for the war effort, he

should fly for the Civil Air Patrol. During this conference, Speers asked plaintiff whether he felt he should stay in the Civil Air Patrol for the duration, to which he replied that he was in the Civil Air Patrol for the duration, but that this had nothing to do with whether he made pictures or not. The former insisted that plaintiff's objections to the director and the cast were not well founded, and that the production of the picture would prove to be one of the best. Likewise, he reminded plaintiff that he had volunteered to be the intermediary between the latter and Kelley, also that this was the first time since the latter's differences with Kelley that it had become possible to work with him on amicable terms about a production, and that this was their first opportunity to get together, and that he was anxious to make a go of it. He added that it would be painful to him to see this first sort of reunion between plaintiff and himself fail, although it meant nothing to him in a monetary way and affected only his pride, and that a refusal on plaintiff's part to do the picture might lead to a suspension.

Plaintiff, however, took the position that if it were necessary for him to be suspended because of such a production, he would fly for Lockheed or the Civil Air Patrol during the suspension, because he didn't feel like wasting time making a picture, which he described as "crap," and that he was not going to sacrifice what he had built up over a period of years to make a production which he didn't feel had any value to the public or to himself.

During this conversation, they also discussed other subjects, including the war, navigation, and the things [258] plaintiff was teaching and other matters pertaining to flying, in which they were mutually interested. Plaintiff commented how badly he felt that because of his age he

was not allowed to enlist in any of the flying activities of the Army or the Navy and that he could not be accepted either as a cadet or in the flying crews. At the close of their talk, plaintiff stated it would be necessary for him to confer with his agent, Oscar Cummins, before reaching a final conclusion.

Shortly thereafter, according to the testimony of Cummins, and prior to April 12th, the latter conferred at defendant's studio with Speers and another of its executives, named Edward Muhl, head of its Contract Department, in an attempt to adjust the then existing difficulty, and upon said occasion plaintiff's agent suggested that the problem could be solved by having another director assigned for the picture, but this suggestion was rejected. This testimony has not been contradicted.

Some days later, this discussion was resumed over the telephone. Upon the latter occasion, according to plaintiff's testimony, the latter stated that, inasmuch as the picture "Fired Wife" had been cheapened both with respect to the director and the cast, he would not play the role of Hank. He further said that he felt the picture would not be made as it had been represented to him by Speers, namely, as an "A" or first-class production, but, instead, would prove to be a "B," or second-class production, and that, rather than waste his time on such a production, he would fly for Lockheed testing bombers, or fly for the Civil Air Patrol. Speers retorted that plaintiff was putting the studio in a terrific hole, and he evidenced resentment at plaintiff's attitude, and likewise pointed out that the position plaintiff was taking [259] might lead to his suspension. To this the latter replied that if such action on his part meant suspension, it would have to mean that, because he did not feel like playing the part of Hank.

Save in the particulars hereinafter to be noted, plaintiff's version of these two conversations is corroborated, or at least not disputed, by the testimony of Speers. In this connection it should be observed the latter testified that before taking the stand he had refreshed his recollection as to what had been said, by reading a memorandum contained in one of defendant's files and which had been recently called to his attention. This memorandum, he stated, had been dictated by him about three months after the conversations had taken place, and purported to be an inter-office communication to Muhl from himself. It recited, in substance, that on April 10th, 1943 he had a long talk with plaintiff about him doing "Fired Wife," that the latter informed him he was on the verge of refusing to do the picture, partly because he was unhappy about the selection of the director and partly because he was seriously thinking of signing up with the Civil Air Patrol or the Army for the duration of the war, that Speers had pointed out to him why such a refusal would be unfair, and that plaintiff replied he could not make up his mind whether or not to do the picture; also that during a telephone conversation held two days later plaintiff stated he had made up his mind not to do the picture, because he felt it to be his duty to give 100% of his time to war work and was signing up with the Civil Air Patrol for the duration. (Underscoring ours.)

Shortly following said telephone conversation, according to the testimony of Speers, Kelley, and Emmett Ward, assistant to Muhl, a conference was held between the three of them, [260] during which Speers reported he had just been informed by plaintiff on the telephone that the latter would not play the role of Hank, also that he had signed up, or was going to sign up, for the duration of

the war with the Civil Air Patrol, or some other military service, also that he would not do any more pictures for the duration, and knew that he was something of
----- but there
was nothing he could do about it. (Underscoring ours.)

Likewise, Kelley testified that a few days before the above mentioned conference Speers had told him about a prior conversation which Speers had had either with plaintiff or his agent, Oscar Cummins, in which one of the latter two complained about the director for the picture "Fired Wife," claiming that he was not of a caliber who should direct plaintiff and that with such a director set-up the picture was not important for plaintiff. However, this witness had no recollection that at the time Speers reported to him concerning this prior conversation the latter had claimed that either the plaintiff or his agent had said that plaintiff was thinking seriously of going into the Civil Air Patrol. Likewise, according to Kelley, it was the latter who suggested either to Muhl or to Ward that a wire be sent to plaintiff to find out if it was true that he would not be able to do any more pictures for the duration. (Underscoring ours.)

Ward further testified that about April 9, 1943 he caused to be prepared a proposed letter to plaintiff and submitted the same to Muhl for the latter's signature. However, this document was never signed and, according to Muhl, it was upon his decision that the same was not sent. The first paragraph of the proposed letter—being

the only portion having any significance in the present lawsuit—was [261] worded as follows:

“You have heretofore notified Mr. Robert Speers, by telephone, that you have been listed in the Civilian Air Patrol for the duration of the present war and will therefore be unavailable to us for the rendition of any services pursuant to your contract of employment with us dated November 21, 1938, as heretofore amended and extended. This is to notify you, therefore, that, commencing as of April 9, 1943, said contract of employment with us dated November 21, 1938, as amended and extended, shall be and is hereby suspended, both as to compensation and as to the running of the now current term of employment of said contract.” (Underscoring ours.)

On Saturday, April 10th, Speers instructed his secretary to deposit with Western Union Telegraph Company three telegrams, each addressed to the plaintiff and bearing the date last mentioned. One of these telegrams was addressed:

“Mr. Robert Cummings
Care Oscar Cummins
8511 Sunset Boulevard
Los Angeles, California.”

Another telegram was addressed:

“Mr. Robert Cummins
Care Oscar Cummins
527 California Bank Building
Beverly Hills, California.”

The third telegram was addressed:

“Mr. Robert Cummings
14111 Sherman Way
Van Nuys, California” [262]

Except as to the address thereof, each telegram was worded identically and read as follows:—

“You are hereby instructed to report to us at our studio at Universal City, California, at 10 o’clock Monday morning, April 12, 1943, for the rendition of your services under your contract of employment with us dated November 21, 1943, as heretofore amended and extended, in connection with the portrayal of a role in our photoplay now entitled “Fired Wife” and/or the rendition of such other services as we may require under said contract, as amended and extended.

Universal Pictures Company, Inc.,

By Edward Muhl

Assistant Secretary”

(Underscoring ours.)

On the same day, at approximately 6 P. M., Speers’ secretary left these telegrams at the Beverly Hills office of the Telegraph Company. At about 10 A. M. on the following day Western Union telegraphed defendant to the effect that the locations described, respectively, as 527 California Bank Building, etc. and 8511 Sunset Boulevard, etc., were closed until morning, also that the person addressed at 14111 Sherman Way, etc. was out of the city and his address unknown, and that the company had

telephoned to Mrs. Oscar Cummins, who would relay the message. On Monday, April 12th at about 6 P. M., the Telegraph Company wired defendant to the effect that the telegram addressed to 527 California Bank Building, etc., had been telephoned on the preceding morning to the addressee's sister-in-law, who would relay the message to him.

The plaintiff, also his agent, also the latter's wife and brother, each testified, denying receiving any such message, [263] either in whole or in part. Plaintiff further denied that he had any sister-in-law, although it was admitted there had been occasions when his agent claimed to be his brother. Even though we discount such denials, nevertheless, in the light of the aforementioned reports made by the Telegraph Company to defendant it is obvious that none of the telegrams was delivered in the customary manner, either to plaintiff or to his agent, or, in fact, to anyone purporting to be in contact with him. As pointed out by the Court at the close of the oral argument, while it is probable that on April 11th one or more of the telegraph company's employees read the telegram of April 10th over the telephone to someone claiming to be plaintiff's sister-in-law and who promised to relay this message to him, it is inherently improbable that the party hearing the same copied it down or remembered all of its contents. Likewise, the most that may reasonably be drawn from that incident is that the lady who received this telephone message construed the same as a telegram from defendant requiring plaintiff to report at its studio the next morning to perform services in connection with a photoplay entitled "Fired Wife," and that she repeated this much of the message and nothing more, either to plaintiff or his agent either the same day or the next.

According to Speers, within a day or two of this last telephone conversation with plaintiff, he was informed by the latter's agent over the telephone that said agent had talked to plaintiff about his refusal to work in the picture; also that he still had hopes of getting his principal to do the picture, and promised to communicate later with Speers. Because of such promise the latter claimed he had delayed sending the telegrams until late on April 10th.

At this point, it should be noted that while both [264] Kelley and Ward testified that early in April, 1943, Speers had reported having held a telephone conversation with plaintiff, in substance as described by him on the witness stand neither of said witnesses corroborated his testimony to the effect that he reported having had a prior conference with plaintiff wherein the latter allegedly asserted that he was seriously thinking of going into the Civil Air Patrol, or otherwise made any reference to engaging in military service. Likewise, there is an absence of corroboration of Speers' testimony to the effect that following his last telephone conversation with plaintiff the latter's agent promised to communicate with the former relative to getting plaintiff to do the picture.

In this same connection it is appropriate to consider a certain affidavit, verified by Speers on October 21, 1943, and filed in support of defendant's application for an injunction pendente lite herein. This affidavit purports to set forth important parts of the discussion had between plaintiff and Speers at the latter's office in April, 1943, and also calls attention to what plaintiff allegedly told him over the telephone about two days later. It is significant that in said affidavit, although Speers does aver that during the office conference plaintiff told him "that

he was considering refusing to render his services in said photoplay ("Fired Wife") for the principal reason that the director selected for said photoplay did not meet with his approval and also because he was thinking of signing up with the 'Service' for the duration of the war," and while he does further assert that in the subsequent telephone conversation plaintiff stated that "he had decided not to render the services requested of him by Universal and would not appear at the studios of Universal to portray the said role" (of Hank), Speers does not [265] allege therein either in words or in substance that plaintiff told him that he had signed up or was going to sign up for the duration of the war with the Civil Air Patrol or some other military service, and that he would not do any more pictures for the duration, or that plaintiff made any similar statement in whole or in part. (Under-scoring ours.)

In addition, Muhl testified that prior to April 10th he was informed, first by Ward and later by Speers, to the effect that plaintiff would not portray the role of Hank and that defendant would receive no more of his services for the duration of the war, because he was signing up with the Civil Air Patrol or some other organization connected with the Army Air Corps.

Likewise this witness and also Kelley asserted that they believed and relied upon such information, and when it was learned that plaintiff had failed to report at the studio on April 12th, and upon being advised by the Contract Department that it would be lawful to suspend plaintiff for the duration of the war, instructions were issued to that effect and accordingly defendant suspended

plaintiff on that date for the duration of the war and stopped his compensation for the same period. (Under-scoring ours.)

Reading from a memorandum, which he explained had been dictated by him a few minutes after the conversation referred to therein had taken place, Muhl testified that on April 13th in a telephone conversation had with Oscar Cummins on that day, he informed the latter that following plaintiff's statement to Speers over the telephone that he was in the Civil Air Patrol for the duration and would not report for his role in the photoplay "Fired Wife," defendant had wired plaintiff to report on April 12th to Kelley; that he failed to do so, and to establish a clear position, defendant [266] intended to suspend him from the payroll as of that date; also, that plaintiff's agent replied that such action was proper, that he was sick at the situation, also that he had talked to plaintiff the preceding night and was trying to get him to come in for a further discussion with Speers and Muhl; also that Muhl stated that defendant would recast the role, to which said agent replied he understood defendant would have to do this, but he didn't think the situation was fair to plaintiff or to the studio or to plaintiff's country and he would like to straighten it out.

On the other hand, plaintiff's agent has testified that at no time when conversing with Muhl or Speers or any other employee of defendant did he state that plaintiff was unavailable for the duration of the war because he had joined the Civil Air Patrol, or any branch of the Air Forces, or for any other reason, and that on none of these occasions was any reference made respecting what service plaintiff would render for the Civil Air Patrol. He has further denied that in any such conversation there was

any mention made to the effect that a wire had been sent to plaintiff to report at defendant's studio, or that he expressed approval of defendant's action suspending plaintiff, although said witness conceded defendant was entitled under the contract to suspend him for the period required by a substitute to portray the role of Hank.

As admitted by the pleadings, on April 15th defendant served upon plaintiff a notice, the body of which read as follows:

"This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your contract of employment with us dated November 21, 1938, as hereto- [267] fore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943 in accordance with our notice to you dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect.

"At the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to wit: the role of 'Hank' in the photoplay now entitled 'Fired Wife.' By reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person.

"This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us." (Underscoring ours.)

Upon May 18, 1943, defendant served upon plaintiff an additional notice, the body of which read as follows:

"Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days [268] commencing April 12, 1943. This is to notify you that we have elected and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

"Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

"This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us."

On Wednesday, May 26th, according to the testimony of plaintiff's agent, also that of the latter's secretary, also that of plaintiff's former chauffeur, each of these individuals requested the delivery of the weekly salary check for plaintiff, that in each instance an employee of defendant, either in the paymaster's office or in the cashier's department, replied in substance that plaintiff was under suspension and therefore no salary check was ready.

It further appears from the testimony of Kelley that on May 28th he had a telephone conversation with a Mr. Ben Thau, a producer for Metro-Goldwyn-Mayer Studio, relative to the subject of that studio employing plaintiff to do a picture for it. Reading from a memorandum alleged to have been prepared by his secretary from stenographic notes made by her [269] upon said occasion, he testified, in substance, that Thau informed him that Metro-Goldwyn-Mayer desired to employ plaintiff to portray a role in a photoplay it was proposing to produce; that Kelley replied that Cummings was on suspension, "he just refused to do a picture over here," that it was "one of those things again, he said he would rather do pictures on the outside"; that Thau added, "We have a great part here"; whereupon Kelley retorted, "We wouldn't let him go on the outside; if we did that, he would never do a picture here; he claims he can't do a picture on account of being in the army"; that thereupon Thau commented "We could use him here" to which this witness answered, "we can't do that; he is under suspension"; that this conversation continued in a similar vein, Kelley adding that defendant then had a picture into which it could put plaintiff, also that the latter had worked

in the Boyer picture and was all set to do another," that everything was fine and he was tickled to death, and two days before the picture was to start he called and said he couldn't work and was going into the Civil Air Patrol, so that's the situation." (Underscoring ours.)

According to Muhl, on May 28th the latter and Oscar Cummins held a telephone conversation, a memorandum of which was allegedly dictated by him a few minutes later. Reading from said memorandum Muhl testified that upon said occasion he told plaintiff's agent he had heard a rumor that Metro was interested in plaintiff and inquired whether he knew anything about it; that Cummins answered in the negative and further stated that P. R. C., a producing organization, called him to ask about plaintiff's availability and that he advised them that plaintiff was engaged in work connected with establishing an air shuttle service, and that anybody wanting him would have to see General Arnold of the Army Air Corps; and that the [270] witness asked Cummins if anybody had suggested to Metro that plaintiff's suspension had been terminated or that he was free either from his contract with defendant or to work with anybody else, and that plaintiff's agent replied he was positive there was nothing like it.

On the other hand, the latter denies having talked with Muhl on May 28th, or having had a similar conversation at any other time, except he does admit that on a much earlier date, and during the course of a conversation wherein they talked about changing some of the terms of plaintiff's contract and thereby adjusting the then existing controversy, Cummins mentioned that P. R. C., a producing organization, had inquired whether plaintiff would be available to work in a picture it intended to produce.

"Universal Pictures Co., Inc.
Universal City, California

May 29, 1943.

Under second paragraph of said letter, you state that said contract is further suspended after the expiration of said period because of my purported [271] failure, refusal and/or neglect to perform my obligations thereunder. As you are well aware, there has been no failure, refusal and/or neglect of my part to perform my obligations under said contract at any time since the expiration of said period of 5 weeks and 2 days, assuming, without admitting, that there was such a failure with respect to said period of 5 weeks and 2 days. Assuming that you had the right of suspension for said period of 5 weeks and 2 days, such suspension would have ended on May 18, 1943. Accordingly, compensation was payable to me under said contract for the period after May 18, 1943. On May 26, 1943, (on which date

compensation under said contract was payable to me), at or about 2:30 p. m., demand was made upon you for the payment of the compensation due and payable on said date. At said time, you failed and refused to pay me the compensation which was due and payable under said contract. Such failure and refusal was a material breach by you of your obligations under said contract and I hereby notify you that I elect to and do hereby terminate said contract by reason of such failure and refusal.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which I may have in the premises, all such other rights and/or remedies being expressly reserved by me." (Underscoring ours.)

"ROBERT CUMMINGS."

The other notice was on the letterhead of defendant, was dated June 2, 1943, and read as follows: [272]

Registered Mail

"Mr. Robert Cummings
c/o Oscar Cummins
9441 Wilshire Boulevard
Beverly Hills, California

Dear Mr. Cummings:

This is to acknowledge receipt of your telegram of June 1, 1943.

Please be advised that despite your purported termination of your contract with us, dated November 21, 1938, we will continue to treat and consider said contract as being in full force and effect.

In our notice to you under date of May 18, 1943, we notified you that your employment under said contract, as amended, would be further suspended during the continuance of your failure, refusal and/or neglect to perform your obligations thereunder.

At no time since April 12, 1943, up to and including the present time, have you notified us of your willingness to perform pursuant to the terms of said contract, as amended. If you are willing to resume your services under said contract, as amended, please notify Mr. Muhl at our studio, and upon your reporting pursuant to such notification, we will terminate the suspension of your employment. Failing such notification by you, your employment will continue in suspension during the continuance of your present failure, refusal and/or neglect to perform your obligations under said contract, as amended, and until you do report ready to resume [273] and perform your services under said contract, as amended.

We reserve the right to extend your employment under said contract, as amended, for a period equivalent to the period of such suspension, and this notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl

By Edward Muhl

jab/j

Assistant Secretary"

It was further stipulated that since May 29, 1943 there had been an interchange of notices and letters from defendant to plaintiff and from the latter to the former, the purport of which is that defendant claims the contract still exists between them, whereas plaintiff claims that by reason of defendant's material breach thereof the contract has been terminated by him as of May 29, 1943. Likewise, the parties have admitted that all written notices, copies of which are appended to any of the pleadings and plaintiff's affidavit filed in connection with the motion for summary judgment, etc., may be considered authentic and as having been sent and received, as the case may be, by the parties therein designated, and also that since the commencement of the instant suit defendant has sent and plaintiff has received two other notices, dated, respectively, November 15, 1943, and December 20, 1943. Each of these notices was worded similar to that of May 18, 1943, except that the period of suspension specified in the [274] one dated November 15th consisted of five weeks commencing October 11, 1943, while the period of suspension in the other was specified as five weeks commencing November 16, 1943.

On June 3rd plaintiff's agent telephone to Muhl and requested an appointment for the purpose of endeavoring to adjust the then existing difficulty between plaintiff and defendant.

Reading from a memorandum alleged to be a transcript of the stenographic notes made upon said occasion by his secretary, Muhl testified that in the course of that telephone conversation Cummins asserted he wanted to discuss this matter privately and if there be any hope to work anything out he would like to do it, and that to

this remark Muhl replied that since the matter was in a formal phase and as long as the status thereof was that of a clinch, their talk could not be completely private and confidential, and that he suggested plaintiff's agent contact him further about the middle of that afternoon.

Subsequently and on the same day Cummins and Muhl conferred in the latter's office, Ward also being present. Again refreshing his recollection from a memorandum alleged to have been dictated by him within a few moments after the conclusion of their talk, Muhl testified that during the course of said conference plaintiff's agent asserted that when he had talked to the latter over the telephone the preceding week, he had known nothing about the position being taken by plaintiff; also that the situation between the latter and defendant had been reviewed by himself, his brother and a former Justice of the California Supreme Court and they had decided defendant had breached the contract, outlining his reasons for such conclusion, and also stating he wanted to [275] avoid litigation, if possible; that he further claimed demand for plaintiff's compensation had been made on May 26th by two persons, but that no check for the same had been obtained; and that a similar request had been made upon defendant's treasurer, who answered that there was no check for plaintiff since he was on suspension. During that same conference, according to Muhl, the latter stated that defendant also desired to avoid litigation and he denied that it had breached the contract; also that Cummins outlined a proposition for modifying the terms of the contract, which proposal Muhl informed him could not be entertained; that in addition the latter told him there had been a deliberate effort to entrap defendant in a legal situation to the end that plaintiff would be relieved

of his responsibilities under the contract, but that he did not accuse Cummins of this since the latter had assured Muhl he did not know of plaintiff's plan.

Cummins, however, denies that during the aforementioned conference he stated that when he talked with Muhl the previous week he had known nothing about the position being taken by plaintiff, or that the situation between plaintiff and defendant had been reviewed by a former Justice of the California Supreme Court, or any other Judge, and further denies that any accusation was made as to an effort to entrap defendant.

It is significant that in a certain affidavit, verified by Muhl on November 3, 1943, and filed in support of defendant's application for an injunction pendente lite herein, he asserted that the telephone conversation which on the witness stand he specified as having occurred on May 28th took place on March 28th, 1943. Likewise, in the same affidavit, although it is averred therein that at all times [276] since plaintiff's suspension, defendant has understood and believed he would not and did not intend to render services for it, or otherwise was willing to resume his obligations under the contract between them, nowhere in said document is there any statement to the effect that plaintiff had represented, or that Muhl had been informed he had represented that he would devote 100% of his time to the war effort, or that he had signed up for the duration of the war with the Civil Air Patrol, or any other military service, or that he would not work in pictures for the duration of the war.

In this same connection, it should also be noted that between April 13th and May 28th Muhl and plaintiff's

agent had, according to the former, at least two and possibly three, and according to the latter, perhaps six, conversations, in each of which they talked about suggestions made by Cummins to the effect that plaintiff's employment be arranged on a different basis, also that one of these suggestions was that plaintiff be released from working exclusively for defendant, that, instead, he should do one or two pictures a year for the latter, reserving the right to work for some other studio, and likewise that he was thinking of going into government work and desired or expected to devote part of his time to government service.

It should further be observed that, according to Muhl, either in the latter part of April or fore part of May, 1943, he had a conversation with a Mr. Prinzmetal of Metro-Goldwyn-Mayer Studio and that upon said occasion the latter inquired as to what position defendant would take in the event Metro-Goldwyn-Mayer could get plaintiff to do a picture for them and also suggested if this could be accomplished it might prove a way of solving the difficulty then existing between plaintiff and defendant. Yet at no time during that dis- [277] cussion did Muhl assert or even suggest that plaintiff had arranged, or had represented that he had arranged, to devote all of his time for the duration of the war to some military service of the United States and therefore it would be impossible to get him to do a picture, or that therefore it was useless to discuss such a proposition.

Likewise, it is pertinent to point out that during the various conversations had subsequently to April 10th be-

tween Muhl and plaintiff's agent—the former admits there were at least six, while the latter claims there were several more—there was not a single instance when Muhl took the definite, unequivocal position of declining, upon the ground that plaintiff theretofore had undertaken to devote 100% of his time to some government service, to discuss the subject of modifying the terms of plaintiff's contract whereby the latter would be allowed to make less pictures for defendant and be enabled to make some pictures for others. Indeed, according to Muhl, in only two of these conversations was any reference made to the matter of plaintiff being, or of his becoming, connected with the Civil Air Patrol, or any other military service.

Again, it is significant that in the conversation had between Kelley and Thau of Metro-Goldwyn-Mayer the former likewise did not take a definite, unequivocal stand, namely, refuse to discuss the matter of another studio employing plaintiff to do a picture upon the ground that the latter had become connected with some military service for the duration of the war, devoting all of his time to the same, or even that he had so represented, and hence it would be useless to discuss the subject. On the contrary, upon said occasion, according to Kelley, the latter stated to Thau "It is one of those things again; he said he would rather do pictures on [278] the outside." (Underscoring ours.)

At least two of defendant's executives—Speers and Muhl—stated that for some months prior to April, 1943, they had known about plaintiff being in the Civil Air

Patrol, also acknowledged having seen him in the uniform of the latter organization upon at least one occasion, and further admitted that during said period each had held conversations with him wherein he had related some of his experiences with the patrol, also had explained his status therein, what he was doing in it, and that he had disclosed he could resign therefrom at any time.

According to plaintiff,—his testimony on this point stands uncontradicted—he joined the Civil Air Patrol in the early part of 1942 but has never signed up for or gone into active service with that organization. Likewise, in the aforementioned affidavit made by Muhl, the latter averred, among other matters, the following:

“A letter date July 6, 1943, written over the signature of 1st Lt. J. W. Gilges, an intelligence officer attached to the Seventh Army Air Force Flying Training Detachment at Oxnard, California, requesting certain information regarding Cummings, was received by Universal. From the contents of this letter we had reason to believe and still believe that Robert Cummings applied for enlistment in some capacity in the Army Air Forces. The Los Angeles Times carried a news item dated July 17, 1943, that Cummings’ now is serving as an instructor for the Army Air Force cadets at the Mira Loma Flight Academy Cummings was sworn into the Air Force Reserve this week and had been assigned to his first class of cadets.” [279]

In addition, the entries kept in the log covering plaintiff’s airplane operations for the Civil Air Patrol disclose that he made numerous trips for that service between

the latter part of May, 1942, and the corresponding period in 1943. On each of these trips he flew beyond Los Angeles County, and on most of them he flew to points beyond this state. Two of these trips were made on May 23rd and 24th, respectively; another, on August 16th, still another on September 12th, two were made on Sept. 13th; there were three on September 14th, also two on October 11th, another on October 12th, still another on October 30th, also two on October 31st and four were made on November 1st; there was one trip on each of the days of November 6th, 7th, 8th, 16th and 20th to 30th, inclusive, also one trip on each of the days of December 1st, 2nd and 3rd; there were two trips on each of the days of December 4th, 5th and 6th; a single trip on each of the days of December 7th, 8th, 9th, 11th, 13th to 18th, inclusive, also a single trip on December 27th, another on December 28th; two trips on December 29th and a single trip on December 30th, all in the year 1942. Again, in the year 1943 he made one such trip on each of the days of January 3rd, 6th and 9th, also two trips on January 10th, one trip on each of the days of January 11th, 12th, 13th, and 15th, also two trips on January 16th, another trip on January 17th, still another on January 18th, and two trips on the 19th of that month. On March 28th, he flew on two trips; again, on April 11th he made four trips, and on the 22nd of the same month he made another trip. He made one trip on May 7th, two trips on May 8th, also one trip on each of the days of May 9th, 10th, 19th and 20th, likewise, two trips on May 21st and again on May 22nd, also three trips on May 23rd, a single trip on each of the days of May 24th, 25th and 27th, and two addi- [280] tional trips on May 28th.

In view of these log entries, also the admissions on the part of Speers and Muhl, respecting their knowledge

for a period of months prior to April, 1943, concerning plaintiff's affiliation with and participation in the operations of the Civil Air Patrol, and taking into consideration plaintiff's uncontradicted testimony upon the same subject, it is quite likely that plaintiff was continuously absent from Los Angeles County during several distinct and separate periods between September 13, 1942, and May 28, 1943. Likewise, it is altogether improbable that such executives as Speers, Muhl and Kelley among defendant's officials were ignorant of those facts. Rather does the evidence persuasively warrant the inference that these officials recognized such activities on the part of plaintiff as being in furtherance and in support of the war effort and accordingly approved the same. So far as the record discloses, prior to April 10, 1943, defendant had had no difficulty in contacting plaintiff 'whenever necessary, either directly or through his designated agent.

The contract, in paragraph 15 thereof, provides, in part, that: "All notices which the producer (defendant) is required or may desire to serve upon the artist (plaintiff) under or in connection with this agreement may be served by addressing the same to the artist at such address as may be designated from time to time in writing by the artist * * * * * and, in any case, * * * * * by sending the same, so addressed, by telegraph, * * * * *. If the producer elect * * * * * to send the same by telegraph * * * * *, then the date * * * * * of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice."

It is undisputed that on or about November 27, 1941, [281] plaintiff, in writing, advised defendant that

all written notices which the latter was required or might desire to serve upon him or in connection with said contract be addressed to him "care of Oscar Cummins, 8511 Sunset Boulevard, Los Angeles, California," and that said designation was furnished to defendant upon one of its forms provided for such purpose. Likewise, it was shown that the last mentioned address had been the business address of both plaintiff and his agent until about the end of May, 1942, at which time plaintiff's agent removed to Suite 527 California Bank Building, Beverly Hills, California, and simultaneously plaintiff's business address was established at the same place where it remained until after the commencement of the present litigation. In view of the various telephone messages exchanged and the conferences had between plaintiff and one or more of defendant's executives prior to April 10, 1943, and also the many telephone messages exchanged and the conferences had between plaintiff's agent and one or more of defendant's executives, some of which were held prior and the remainder subsequent to that date, it is reasonable to conclude that defendant had no difficulty contacting plaintiff through his agent.

It is not disputed that plaintiff informed Speers he would not appear in the picture "Fired Wife"; likewise that he did not portray any role therein, nor did he report at defendant's studio on or after April 12, 1943; that, subsequent to the last mentioned date, defendant proceeded with the production of said picture, employing a substitute to portray the role of Hank, and that the same was completed on May 19th of that year.

At the trial it was also stipulated that under the contract plaintiff became entitled to compensation on May [282] 26, 1943, at the rate of \$250.00 per day for three days of the week, ending May 22nd, and that subsequently he became entitled to additional compensation at the same rate for the week ending May 29th, unless the Court should decide that defendant was entitled to suspend him at all times from and after May 20th, as it undertook to do. Likewise it was stipulated that defendant failed to pay any salary to plaintiff on May 26th, 1943, also that no salary has been paid to him since said date by defendant or on its behalf; and that at all times mentioned in any of the pleadings Oscar Cummins was plaintiff's agent and representative and duly authorized to talk and act in all matters in which he purported to, or did, talk or act. It was further stipulated that no written demand was made by defendant at any time after April 10, 1943 (other than the telegram of April 10, 1943) that plaintiff report to defendant in connection with any picture other than "Fired Wife," or for any services pursuant to said contract.

The contract involved herein provides, in part:

"2. The artist (plaintiff) agrees that * * * * * he will render the services hereinafter specified, * * * * *; that he will render his services as an actor in such roles and in such photoplays and/or other productions as the producer may designate; that he will make personal appearances in motion pictures theatres and/or other places of entertainment and/or will render his services as an actor in vaudeville, plays and/or in all other kinds of performances

on the speaking stage; that he will render his services as a radio performer, not only by broadcasting in person, but also by making electrical transcriptions and/or by any other present or future methods or means; that he will render his services as an actor in television [283] productions; and that he will render his services in connection with the broadcasting and/or transmission of his likeness and/or voice by means of television, radio, and/or otherwise, whether such broadcasting and/or transmission be either directly or indirectly in connection with or independent of photoplays. The artist further agrees that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer (defendant) in connection with the services to be performed by the artist hereunder; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer."

"12. * * * * * in the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder * * * * * as instructed, the producer, at its option, * * * * * may refuse to pay the artist any compensation during the period of such failure, refusal or neglect on the part of the artist, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, or shall have been

directed to render any other of his required services hereunder, then and in either of said events, the producer shall have the right to refuse to pay the artist any com- [284] pensation during the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time, or for any portion thereof. Should the producer notify the artist that the artist has been cast to portray a role in a photoplay or to perform any other of his required services hereunder, and should the artist thereupon or at any time prior to the designated date of commencement of the rendition of such services, advise the producer that the artist does not intend to render such services, the producer shall thereupon, or at any time thereafter, have the right to refuse to pay the artist any compensation commencing as of the date on which the artist has so advised the producer of his intent not to perform, or, at the producer's election, as of any time thereafter, and continuing until the expiration of the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or of such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term

of this agreement and all [285] of its provisions for a like period of time or for any portion thereof. * * * * * Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and no one of them as exclusive of the others or of any right or priority allowed by law.”

“13. If this agreement be suspended, or if the producer refuse to pay the artist compensation, pursuant to any right to do so herein granted to the producer, * * * * * if in connection with such suspension, refusal to pay * * * * *, the producer shall exercise the right to extend this agreement for a period equivalent to all or any part of the period of such suspension, refusal to pay * * * * *, then and in that event the running of the then current term or period of the artist’s employment hereunder shall be deemed to be interrupted during the period of such suspension, refusal to pay * * * * *, but shall be resumed immediately upon the expiration of such suspension or * * * * * (in case of any such refusal to pay) upon the resumption of the payment of compensation, and * * * * * shall continue from and after the date of such resumption for a period equal to the unexpired portion of such term or period at the time of the commencement of such suspension, refusal to pay * * * * *, less a period equal to that portion, if any, of the period of such suspension, refusal to pay * * * * *, for which the producer does not exercise the right to extend this agreement.”

“14. No waiver by the producer of any breach of any covenant or provision of this agreement shall [286] be deemed to be a waiver of any pre-

ceding or succeeding breach of the same or any other covenant or provision."

"19. The artist expressly agrees that until the expiration of the term hereof he will be available at all times in Los Angeles, California, or at any other place the producer may designate, unless excused in writing by the producer. The artist further agrees that if and when requested by the producer to do so, he will report at the producer's studio, or at any other place the producer may designate, for wardrobe fittings, publicity interviews, publicity photograph sittings, making tests and/or 'stills,' and for such discussions as the producer may deem necessary or desirable; it being understood, however, that no compensation whatsoever shall be or become payable to the artist for the compliance by the artist with such requests of the producer."

One additional aspect of the evidence remains to be noted. As conceded by defense counsel during the oral argument had at the close of the trial, plaintiff's version concerning what was said during the lengthy conference at Speer's office in the early part of April, 1943, and also his account of what they said during the telephone conversation which followed perhaps two days later, was corroborated in substance by the testimony of Speers except in the following important particular. The latter testified in effect that during said telephone conversation plaintiff represented that he had signed up for the duration of the war with the Civil Air Patrol, or some other military service, also that he had decided to devote 100% of his time to the war effort, and therefore would not work in pictures.

On the other hand, plaintiff has denied making any [287] such statement either in whole or in part.

It is upon the record we have thus outlined that the issues raised herein must be determined.

As previously observed, defendant contends that by its telegraphic notice of April 10th, 1943, it instructed plaintiff to report at its studio to perform two separate and distinct obligations, each of which was included among those he had agreed to perform under his contract. In this connection it is argued that by said notice he was called upon, firstly, for the rendition of his services in connection with the portrayal of a role in the photoplay "Fired Wife," and secondly, for the rendition of such other services as defendant might require under the contract. Accordingly defendant takes the position that by his failure to report at its studio on April 12, 1943, plaintiff breached the contract in the two respects above mentioned.

Plaintiff concedes that his failure and refusal to portray the role of Hank in the picture "Fired Wife" constituted a breach of the contract, and that such breach continued from the 12th of April to and including the 19th of the following month, at which time the substitute "engaged to portray such role" by defendant completed the same. However, he insists that he had not "been directed to render any other of his required services" under the contract. He further points out that the evidence convincingly shows that neither at the time the aforementioned notice was sent nor on April 12th did defendant intend to direct him to render any of the other specific services which under the contract he had agreed to perform. Hence it is argued that when, following plaintiff's failure and refusal to report at the studio and portray the aforementioned role, defendant

elected to and did exercise the right to engage another person to portray [288] such role, it had "the right to refuse to pay the artist (plaintiff) any compensation," according to the terms of the contract, not for an indefinite period, but only "until the completion of such role" by the substitute. In other words, defendant's right to refuse to pay plaintiff any compensation terminated at midnight on May 19th, and he was entitled to have his suspension from the pay roll terminated at the same time.

It is true that one of defendant's executives, Daniel Kelley, testified to the effect that shortly prior to April 10, 1943, Speers had informed him that plaintiff had stated he would not play the role of Hank and had signed up to render his services exclusively for the Civilian Air Patrol for the duration of the war, and thereupon Kelley suggested either to Muhl or Ward that a wire be sent to plaintiff to ascertain whether it was true that he was not going to be able to do any more pictures for the duration of the war. According to this witness he wanted plaintiff at his office on April 12th to find out from him personally whether his objection was the role or because of his going into the Civil Air Patrol and if the latter, whether he would be unable to do any more pictures for the duration of the war, in which event defendant would have to plan for some other personality for the remaining pictures it had figured for plaintiff. However, this witness acknowledged that the notice of April 10th was neither prepared by nor submitted to him, and further that defendant had no intention of directing plaintiff to perform any services at that time other than to portray the role of Hank.

In considering the issues here raised we shall find it illuminating to refer to certain portions of the oral ar-

gument made in support of defendant's application for an in- [289] junction pendente lite. At that hearing it was conceded that the construction placed upon the contract by the parties, as evidenced by the practice which they had followed, was in substance that from time to time defendant produced certain pictures in each of which plaintiff was assigned to portray a particular role, that he was required to attend at the studio or wherever the picture was being produced, not daily, but only on such days as the producer needed his presence, and that plaintiff was paid compensation, not only during the times that he worked in pictures, but also during periods when he was not so engaged, and even when he was not present at the studio.

During the argument the Court called attention to the wording of defendant's notice of April 15, 1943, in which it advised plaintiff that particularly by reason of his failure to report to defendant on April 12th in accordance with its notice of April 10th, it elected to and did exercise the right to refuse to pay him any compensation, during the period of such failure, also that at the time of such failure he was cast to portray a certain role in a photoplay, that by reason of his failure it was engaging another person to portray such role, and that it elected to and did exercise the further right granted defendant under the provisions of Paragraph 12 of the contract to refuse to pay him any compensation until the completion of such role by such other person. This notice concluded with a reservation of all other rights and/or remedies.

The Court further pointed out that by its next notice dated May 18th, in the first paragraph thereof, defendant claimed it had suspended plaintiff by reason of his refusal to portray said role and also advised plaintiff that

it had elected to extend the term of his employment for the period of such suspension. Reference was then made to the second para- |290| graph of said notice which read: "Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period." This document likewise concluded with a reservation of all other rights and/or remedies.

Thereupon the Court commented in substance that in view of the construction of the contract which the parties had placed thereon by the practice they had followed, it would appear that if defendant desired plaintiff to portray a role in a photoplay (other than "Fired Wife") or to perform any other service, plaintiff was entitled to be so advised by some new or further call to that effect on the part of defendant. "How was he to know," inquired the Court at that time, "under this contract and the construction which the parties themselves gave to it, when his services were further needed unless he heard from the employer?"

To this, counsel then representing defendant responded: "* * * * *", I don't think he would know when his services were needed, so far as acting in productions or reporting for tests or stills are concerned, but that is not the event which gives him his right to compensation. In other words, * * * * * he is entitled to compensation even though in a particular week or series of weeks he may not be near the studio. So that the fact that he will not know until he is notified that there is a production isn't the event which gives rise to his right to pay. * * * * * Certainly where a man refuses to play a role

in a picture there is reason to believe, in the normal course of human events, that there is going to be trouble with this particular man. That is some- [291] thing that is perfectly plain. In other words, there has been some kind of an argument between the artist on the one hand and the studio on the other, which has resulted in the refusal of this man to play a role. Now, the question is, what is the future going to bring? The studio sends him notice, 'we are going to put you on suspension during your present failure, refusal or neglect to perform your obligations under your contract'."

Whereupon the Court inquired, "What other obligations was he called upon to perform which he refused to discharge?"

Counsel's reply was: "Well, so far as the particular case giving rise to this is concerned, it was simply the refusal to play this role; * * * * *. But the important thing, as I see it, is his failure to comply with his obligations under the contract, and whether those obligations relate to the playing of a particular role, or whether they relate to any other obligation under the contract, does not affect the length of time during which he is to be put on suspension, because in either event the length of time is the continuance of his refusal and neglect to perform."

The Court next asked: "And what I am trying to find out is, to perform what?"

To this, counsel responded: "To perform whatever obligations he has under the contract."

Whereupon, the Court observed: "Again, it isn't clear to me which of the obligations, which under this contract he promised to perform, does the record disclose he failed to discharge?"

Defense counsel's reply was: " * * * * * the particular cause for suspension was his failure to portray this particular role, then he was put on suspension. In other words, his particular refusal was to portray a particular [292] ular role. But what I am trying to suggest to the Court is that that is simply the essence in which he refused to perform his contract; * * * * * suppose under the contract the artist was obliged to appear on a radio show at a particular time upon request of the studio and he refused to do it. He said, 'I don't want to do it,' and he does not appear. The studio under this contract, I take it, could suspend him, even though the suspension notice might go out after the date when he was supposed to have gone on the radio. Then it would be up to the plaintiff, or to the defendant, as the case may be,—I mean the artist—to say, 'Well, I have repented. I am ready to go back to work. Please lift my suspension.' In other words, the actual time it takes to do the act for which the suspension is made does not determine the length of the suspension."

Following some further discussion between the attorneys, defense counsel concluded by stating. "The question I was trying to suggest, in answer to your Honor's question, 'When would the artist know when the studio wanted him?' was, when did the studio know when the artist was going to come back and be a good boy, unless he told them so? In other words, is the interpretation to be urged here that where an artist has committed a material breach and the minimum period has expired, namely, when they have gotten a substitute, that irrespective of any manifestation of willingness on the part of the artist to come back to work and to be a good boy, the studio must *then* immediately put him on the payroll and continue paying him for weeks or months,

maybe, before they even get a new role for him, without having any idea whether he is ever going to come back to work? That is the other side of the question with which we are concerned."

Thus, at the hearing of its application for an injunction pendente lite, defendant took the position in effect [293] that by reason of plaintiff's refusal to report at its studio on April 12th, and although it subsequently had employed another person to portray the role which he then declined to fill, and although the portrayal of such role had been completed by the substitute on May 19th, nevertheless, it was entitled to continue thereafter to refuse to pay him compensation, and to continue to extend the term of his contract, unless and until he should advise it that he was willing to perform his obligations under the contract. Carried to its logical conclusion, such contention could lead to a situation whereby defendant would secure control over plaintiff's services, not for the maximum period expressly limited by statute in California, to-wit, seven years, but for a much longer period, and perhaps for the balance of his natural life—a result obviously violative of public policy. Accordingly, this contention cannot be upheld.

The evidence introduced at the trial established without contradiction that where the existing circumstances were such as to afford no reason to believe or anticipate any difficulty, and it was desired to have the artist report at the studio, the practice usually followed was to telephone to him or his regularly designated agent requesting the artist to report accordingly, but that if the circumstances were otherwise and there was reason to believe the artist would not respond the notice was communicated in writing. Likewise, as heretofore pointed out, upon

plaintiff's failure and refusal to report at the studio on April 12th, and as the result of conferences had between several of its executives, including Muhl, Kelley, Speers and Ward, defendant suspended plaintiff from its payroll, not for the limited period required by the substitute it employed to portray the role he then declined to fill, or for any other limited time, but for an indefinite [294] and unknown period, to-wit. for the duration of the war. However, in none of the notices which it caused to be served upon plaintiff did defendant disclose that fact.

Defendant justifies its adoption of this extreme course upon the ground that plaintiff, according to its executive Robert Speers, informed the latter he would not work in the aforementioned picture because he felt it was his duty to give 100% of his time to war work, and therefore was signing up with the Civil Air Patrol for the duration of the war. In the course of the oral argument at the close of the trial defense counsel stated: "Now there is of course a very decided conflict in the evidence with respect to what was said both on April 3rd and April 5th. The plaintiff denies that he said that he was going into the Civil Air Patrol, or the Army, for the duration on April 3rd. I think that is the only real controversy with respect to that conversation. Generally speaking, the parties, that is, Bob Speers and Bob Cummings, agree on the general substance of that conversation. Then we come, of course, to the more important conversation of April 5th on the telephone. In that respect, Bob Speers, refreshing his recollection from the memorandum made three months later, said that the following Monday he had a telephone conversation with Robert Cummings in which he stated that he had made up his mind not to do the picture because he felt that it was his duty to give 100% of his time to war work and therefore was sign-

ing up with the Civil Air Patrol for the duration. Here again we have a direct conflict in the evidence. To my mind, the credibility of Bob Speers is an important issue in the case because everything flows from that conversation of April 5th. If Robert Cummings didn't make that statement our affirmative defense of estoppel goes right out of the window." [295]

We have heretofore pointed out several important portions of the evidence which cast serious doubt as to the accuracy of Speer's version concerning what was said between plaintiff and himself on this subject. Likewise, as previously noted, there were repeated instances, subsequent to April 12th and prior to May 29th, when at least one of defendant's executives engaged in a discussion in which it was proposed, either on behalf of plaintiff or at the suggestion of another that his contract be modified to the extent of permitting him to work in pictures for others as well as for defendant, most of these conversations having been held with plaintiff's agent, while two of them were had with an executive of another studio.

Again in its notice of April 15th defendant called particular attention to its claim that plaintiff had breached the contract in failing or refusing to report at the studio at a time when he was cast to portray a role in a certain photoplay, also pointed out that by reason of such failure or refusal it was engaging another person to portray such role, and further advised that it elected to and did exercise the right to refuse to pay him any compensation until the completion of such role by the substitute. However, while said notice unequivocally set forth defendant's position in the particulars just stated, the same failed to disclose that there was some other service or obligation which defendant was still calling upon plaintiff to perform at the studio.

Defendant's notice of May 18th was similar in character and placed emphasis upon the fact that by reason of his failure, refusal and/or neglect to perform his obligations under the contract plaintiff's employment had been suspended for a period of five weeks and two days commencing April 12th (the same being the time required by the substitute to portray the role of Hank) and accordingly that it elected to and did [296] exercise the right to extend the term of his employment for an equivalent period.

Plaintiff's notice of May 29, 1943, is equally significant. By that document plaintiff called attention to the essence of defendant's notice of May 18th, also stated his position to the effect that there had been no failure, refusal and/or neglect to perform his obligations under the contract since the expiration of the aforementioned period of five weeks and two days, which ended on May 18th, and that compensation for the period subsequent to the latter date became payable to him on May 26th and further claimed that on the last mentioned date demand for the payment thereof was made, but that defendant refused to pay the same, and that accordingly, by reason of such refusal, he elected to and did terminate the contract. It is altogether unlikely that in said notice plaintiff would have alleged that three days previously demand had been made for payment of his compensation and that payment thereof had been refused, unless such occurrence had actually taken place.

Thus the evidence established quite convincingly that between April 13th and May 28, 1943, plaintiff pursued a course of conduct consistent with a purpose on his part to continue working in motion pictures, rather than to suspend such work during the war, and that repeatedly knowledge to that effect was brought home to the defend-

ant, coupled with further information that he preferred to do pictures for others, in addition to making them for defendant, rather than exclusively for the latter. Under such circumstances, and in the face of the record heretofore outlined, it would be unreasonable to conclude that plaintiff had determined he would make no more pictures for the duration of the war, or that he had made a representation to that effect to the defendant. [297]

Rather does the evidence support the view that by the early part of April, 1943, a serious controversy had developed between plaintiff and defendant in connection with his objections to doing a type of picture which he feared would jeopardize his professional standing as an actor; that this controversy, coupled with his refusal to work in said picture, served to aggravate or revive in an aggravated degree the strained relations then existing between him and one of defendant's executives, and furthermore greatly angered, not only this official, but also at least two other executives of defendant; that accordingly they undertook to discipline and make an example of plaintiff or, to paraphrase an expression used by one of the counsel, to compel him to become a good boy. What these officials thereafter caused to be done, as well as what otherwise subsequently ensued, has already been described in some detail.

True, when plaintiff breached the contract on April 12th, defendant became entitled as a matter of law either to terminate the contract, or to avail itself of such rights as were granted to it thereunder. It adopted the latter alternative. One of these rights was to employ another person to portray the photoplay role which plaintiff had declined to fill. Another was to refuse to compensate him for the period required by the substitute to portray such role, in other words, suspend his employment for such

time. A still further right was to continue the term of his contract for a corresponding period.

However, when defendant determined not to terminate the agreement but, instead, to avail itself of the several cumulative rights granted to it thereunder, it necessarily followed that the contract remained in force, not only for its benefit, but also for that of plaintiff. Hence, defendant [298] was still bound to discharge such obligations as the agreement imposed on it. In other words, to paraphrase the rather trite expression that one may not eat his cake and have it too, in this instance defendant was not entitled to retain the rights accorded to it under the contract, and at the same time be relieved from its obligations thereunder.

The several thousand words comprising this document deal almost entirely with the obligations imposed upon plaintiff or the rights granted to defendant, or both. Virtually the only right given to the former and the correlative obligation imposed on the latter by the contract—certainly the most important from his standpoint—involves his right to compensation and its liability to pay the same. The refusal to pay such compensation, therefore, constituted a very material breach of the agreement and not a mere trivial one.

Consequently, when on April 12, 1943, defendant suspended plaintiff's employment for the duration of the war and removed him from its payroll, thereby barring him from compensation correspondingly, it rendered futile any subsequent demand for the payment of compensation owing to him for the period succeeding the completion by the substitute of the role of Hank. Such action on its part was unwarranted and arbitrary, and furthermore constituted an anticipatory breach of the contract. It also rendered unnecessary any demand for the payment of

such compensation, for the law does not require the doing of an idle act. Accordingly, plaintiff was not required to make such a demand as a condition precedent to terminating the contract, although as previously indicated, we have found such a demand was in fact made.

There is yet another serious factor which militates against the position of the defense, and which arises out of [299] the circumstances surrounding the sending of the telegraphic notices of Saturday, April 10th. As already pointed out, these telegrams were not delivered to the telegraph office until after 6 P. M. that night, and yet they purported to instruct plaintiff to report at defendant's studio on the following Monday morning at 10 A. M. thereof. Later, on that same Monday, the telegraph company gave to defendant information of a character sufficient to apprise a reasonable person that if such telegram were intended to advise plaintiff he was needed at the studio for a conference with one of defendant's executives, or for any purpose other than to portray the role of Hank, then no adequate notice for that purpose had been given. Hence, even if defendant's explanation of the meaning of these telegrams were to be accepted—a construction with which we cannot agree—nevertheless, under the circumstances aforementioned we should still be obliged to find that such notice had not been given in time. For this additional reason defendant's conduct in suspending plaintiff's employment for the duration of the war must be held to have been arbitrary and unwarranted.

Let us now examine the contention that because, without defendant's knowledge or consent, plaintiff was absent from Los Angeles County from the 19th to the 29th of May, 1943, during which period he was engaged in activities connected with the Civil Air Patrol, he is barred

from any relief herein. Without intending to repeat our analysis of the evidence relevant to this point, we deem it a sufficient answer to state that on the basis of the construction given to the contract by the parties themselves, as shown by the practice which they followed with respect to this matter up to May, 1943, plaintiff's physical presence was not required in Los Angeles County continuously during periods intervening [300] between the production of pictures and while defendant was in contact with him through his known agent. As previously shown, at least two of defendant's executives were adequately informed concerning these activities on plaintiff's part, and not only did they fail to disapprove them, they also encouraged the same. Likewise as heretofore noted, on April 12th defendant suspended plaintiff's employment for the duration of the war, and hence it would have availed him nothing to have remained in Los Angeles County from and after May 19th.

There remains to be considered the defense that, if defendant breached the contract, such breach resulted from an excusable mistake, from which default it is entitled to be relieved; and that in consideration of such relief it is willing and offers to do full equity, including the payment of such compensation as the Court may find to be due him. As the record discloses, this defense was not interposed until after the lapse of more than six months after the agreement had been broken and plaintiff had given notice of termination thereof. Throughout that period defendant had insisted, both that it was not obligated to pay plaintiff any compensation, and also that the agreement still was in effect and prohibited him from working for anyone else. In fact, this plea was presented by way of a further amendment to the answer, as an additional defense, and without abandoning any other issue raised herein and was offered at a time when, dur-

ing the course of the oral argument upon defendant's motion for an injunction pendente lite, the court expressed doubt as to the soundness of the reasoning upon which defendant sought to justify its refusal to compensate plaintiff. Furthermore it should be observed that this offer to do equity is conditioned upon the Court first deciding that money or compen- [301] sation became due from defendant to plaintiff on or after May 26, 1943. In other words, unless and until such a finding shall have been made, and only upon that condition, is defendant willing to do equity. As previously indicated, defendant's refusal to pay compensation to plaintiff on or after May 26, 1943, was arbitrary and unwarranted. It was not the result of mistake, unavoidable accident, fraud, surprise or ignorance. We are not persuaded that this offer to do equity is either timely or meritorious.

Accordingly, on the basis of the record as above outlined and for the reasons hereinbefore set forth, we conclude that at least by May 29, 1943, plaintiff became entitled to terminate the contract, and that on said date he elected to and did terminate the same; also that defendant has failed to establish any of the defenses pleaded herein; and that plaintiff is entitled to relief under the first count of the complaint, more particularly, to a decree adjudging the aforementioned contract to have been terminated on the last mentioned date.

At the trial we suggested that counsel consider whether there was any question as to the Court having jurisdiction of the subject matter of the second count, inasmuch as the same purported to be a cause of action to recover less than the sum of Three Thousand Dollars (\$3,000.00) allegedly due under a contract. The record discloses that the present suit was originally filed in the Superior Court of the State of California, in and for Los Angeles County,

and that the litigation was removed to this Court upon petition of defendant. Said petition alleged, among other matters, that the within cause is one and presents a controversy wholly between citizens of different states and that the matter in controversy, exclusive of interest and costs, exceeds in value the sum of [302] Three Thousand Dollars (\$3,000.00), said matter being the right of plaintiff to recover the sum of Ten Thousand Two Hundred and Fifty Dollars (\$10,250.00) claimed to be due plaintiff from defendant as salary. Upon said petition the state court granted an order, finding that the within cause is wholly between citizens of different states, that the matter in controversy exceeds in value the sum of Three Thousand Dollars (\$3,000.00), and that said action is one of which United States District Court is given jurisdiction, and adjudged that said cause be transferred and removed to this Court.

Further study convinces us that, although the parties proceeded to trial solely upon the issues raised by the first and second counts of the complaint and the answer and the amendments thereto, nevertheless, the matter of jurisdiction must be determined upon the state of the pleadings, more particularly the complaint when the suit was originally filed. Upon an examination of that record, we are satisfied that the Court has jurisdiction of the subject matter, as well as of the parties. As indicated by our previous analysis of the evidence, plaintiff became entitled to compensation from defendant on May 26, 1943, and also for the subsequent period up to the date of termination of the agreement. Hence, the findings and decree hereafter to be signed herein should include an award in the amount owing on account of such unpaid compensation.

[Endorsed]: Filed Mar. 6, 1944. [303]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 6th day of March in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.
No. 3242-H Civil

Robert Cummings,

Plaintiff,

vs.

Universal Pictures Company, Inc., a corporation,
Defendant.

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that counsel for plaintiff prepare and submit Findings and Decree in conformity therewith, serving a copy upon opposing counsel.

Copies to counsel. [304]

[Title of District Court and Cause.]

OBJECTIONS AND AMENDMENTS TO
PROPOSED FINDINGS AND JUDGMENT.

Comes now the defendant and cross-complainant and makes the following objections and the following proposed amendments to [305] the proposed findings of fact and conclusions of law and the proposed judgment heretofore served and filed by plaintiff, that is to say:

A. As to said proposed findings of fact and conclusions of law:

1. Defendant and cross-complainant (hereinafter referred to as "defendant") objects to that part of paragraph numbered (3) on page 3, beginning on line 8 and concluding with the words "plaintiff compensation" in line 13, and suggests the following in lieu thereof:

"(3) On or prior to April 10, 1943, defendant demanded of plaintiff that plaintiff portray the role of 'Hank' in the photoplay then entitled 'Fired Wife,' and that he report to the Studio of defendant to commence the performance of said role on April 12, 1943, and for the purpose of receiving instructions as to future roles. Plaintiff refused to, and did not, comply with said demand. Plaintiff then and there notified defendant that he, plaintiff, would not perform any of his obligations under said contract, and plaintiff thereby repudiated said contract. Plaintiff did not play said role of 'Hank' in said photoplay entitled 'Fired Wife,' and thereby breached said contract. Thereafter, on April 15, 1943, defendant served a written notice on plaintiff."

2. Defendant objects to that portion of paragraph numbered (5) on page 4, beginning with the word "advising" in line 25 and ending with the word "suspended" in line 30.

3. Defendant proposes that paragraph numbered 6 on page 6 be amended by inserting at the beginning thereof the following:

"Plaintiff never cured his breach as aforesaid, and never retracted his repudiation as aforesaid"; [306]

and by striking out "April 10" in line 6 thereof, and substituting therefor "April 12."

Defendant further objects to that portion of said paragraph 6 beginning with the word "No" in line 8 and ending with the word "contract" in line 11.

4. Defendant objects to the word "not" in line 12 in paragraph numbered 7 on page 6, and to "April 10" in said line, and suggests that the word "not" be stricken out, and that "April 11" be substituted for "April 10."

Defendant further objects to that part of said paragraph 7 beginning with line 26 on page 6 to and including the word "plaintiff" in line 31 on page 6-a.

5. Defendant objects to paragraph numbered 8, beginning with line 32 on page 6-a.

6. Defendant objects to paragraph numbered 9, beginning with line 18 on page 6-b.

7. Defendant objects to paragraph numbered 10, beginning on page 6-b, and to that portion of paragraph 11

on page 6-c and lines 1 and 2 on page 7, and in lieu thereof suggests the following:

“(10) On May 26, 1943, plaintiff appeared at the offices of defendant and inquired of a clerk in the employ of defendant whether a check for the payment of salary beginning May 20, 1943, and ending May 22, 1943, was available, and was informed by said clerk that such check was not available.”

“(11) Defendant’s failure to pay salary for that portion of the week beginning on May 20, and ending on May 22, both dates inclusive, did not constitute a material, or any, breach of said contract. On May 29, 1943, plaintiff sent a written notice to defendant as follows:” [307]

8. Defendant objects to paragraph numbered (13) on page 10.

9. Defendant objects to paragraph numbered (14) on page 10, and in lieu thereof suggests the following:

“(14) Prior to commencement of the above entitled action an actual controversy did exist between said parties, and it was and is necessary for the Court to declare the rights of said parties arising from the facts which are herein found and which were heretofore alleged, the plaintiff having asserted and still claiming that said contract was terminated as of May 19, 1943, and the defendant having asserted and still contending, among other things, that said contract still existed between plaintiff and defendant.

“In that behalf the Court finds that said contract is in full force and effect.

"On the second cause of action, the Court finds that defendant is not indebted to plaintiff for salary or compensation for that portion of the week beginning May 20, 1943, and ending May 22, 1943, or **for the week beginning May 24, 1943, and ending May 29, 1943, or for any sum whatever.**"

10. Defendant objects to paragraphs I, II, III, IV, V, VI, VII, and VIII, beginning on page 11 and ending on page 17.

11. Defendant objects to paragraphs numbered IX, X, XI, XII, XIII, XIV, and XV beginning on page 18 and ending on page 20, and in lieu thereof suggests the following:

"I.

"It is true that plaintiff is wholly without equity and is not entitled to invoke the aid of the Court to terminate or rescind plaintiff's obligations to perform said contract. [308]

"It is true that defendant is entitled to invoke the aid of the Court to prevent the termination and cancellation of said contract by plaintiff, by reason of the breach and repudiation of the plaintiff as herein found.

"II.

"It is true that defendant has offered to fully pay and restore to plaintiff any sums of money or compensation that the Court may find to be due to plaintiff. In that behalf, the Court finds defendant is entitled to equitable relief, but that plaintiff is not entitled to any sum or sums whatever as the condition to such relief, or otherwise, or at all.

“III.

“It is true that plaintiff is estopped to claim any breach of the contract on the part of defendant.

“IV.

“It is true that plaintiff was not available at all times continuously, or at any time, from May 19 to May 29, 1943, to perform such services as defendant might require plaintiff to perform under said contract.

“V.

“It is true that on many occasions prior to April, 1943, and on a number of occasions after April, 1943, plaintiff was frequently outside the County of Los Angeles; but it is true that defendant had no knowledge whatever of any of such absences.”

B. As to said conclusions of law:

1. Defendant objects to paragraphs numbered II to XXIV, both inclusive, and in lieu thereof suggests the following:

“II.

“Defendant is entitled to judgment that said contract [309] is in full force and effect, and plaintiff is not entitled to take anything by his action.

“III.

“Defendant is entitled to costs.”

C. As to said judgment:

1. Defendant objects to paragraphs numbered (1) and (2) on pages 2 and 3, and in lieu thereof suggests the following:

“(1) The written contract between plaintiff and defendant, dated November 21, 1938, as amended, is declared to be in full force and effect.

“(2) Plaintiff is not entitled to take anything by his action, and the same should be, and hereby is, dismissed with prejudice.

“(3) Defendant is entitled to costs.”

Defendant further shows the Court that the reasons for the written objections and proposed amendments are stated in the supporting Memorandum filed concurrently herewith.

Dated April 21, 1944.

Respectfully submitted,

Loeb and Loeb

Joseph L. Lewinson

By Joseph L. Lewinson

Attorneys for Defendant and Cross-Complainant.

Received copy of the within Objections and Amendments this 21st day of April, 1944. Roth & Brannen (Kohl), attorneys for plaintiff.

[Endorsed]: Filed Apr. 21, 1944. [310]

[Title of District Court and Cause.]

ANSWER TO OBJECTIONS AND AMENDMENTS
TO PLAINTIFF'S PROPOSED FINDINGS AND
JUDGMENT.

Defendant in its "Objections and Amendments to Proposed Findings and Judgment" and the "Memorandum" in support thereof seeks to attack the proposed findings and judgment by two techniques:

1. The first is by reference to minute portions of the evidence which is in conflict with the evidence supporting plaintiff's findings, with a significant omission of any reference to the evidence supporting said findings. In certain instances this is accomplished by taking certain portions of plaintiff's testimony out of their context and applying a strained and unnatural construction thereto. [311]

2. The second technique is by raising certain questions of law. The legal conclusions reached in defendant's cited cases are based upon facts which do not exist in the present transcript and raise issues of law not involved in the present case.

None of the matters raised in defendant's aforesaid documents present any question that may be considered as an attack on the proposed findings and judgment.

A. Plaintiff's proposed findings and judgment are all supported by the transcript of the evidence. Defendant's first technique merely refers to minute portions of the evidence which are in conflict with the evidence supporting the findings or refers to certain testimony of the plaintiff taken from its context and applying a strained construction thereto. Even assuming (for argument only) that the conflicting evidence and the isolated portions of

plaintiff's testimony relied upon by defendant would support the construction placed upon them by defendant or would support contrary findings, defendant has been unable to and has not attacked the evidence in support of the findings nor indicated that a single finding is not supported by evidence in the record. This does not constitute an attack upon the findings. Trials without some conflict in the evidence are few and far between, and the citation of evidence in conflict with evidence supporting the findings without a showing that the findings are not based on evidence in the record after the court has found for plaintiff, is in reality an admission that the findings are supported.

The judgment and all of plaintiff's findings are supported by the transcript. Because of the aforesaid, and in view of the fact that the court has already carefully and comprehensively weighed and interpreted the testimony in this trial in a complete opinion filed in this case, it would serve no useful purpose and would be repetitious for plaintiff to now burden the court with detailed references and quotations from the transcript in support [312] of the submitted findings.

B. Defendant's legal points are based upon assumed facts not contained in the evidence and raise legal questions not involved in the case at bar.

1. Defendant first cites authority to the effect that plaintiff cannot put defendant in default while plaintiff himself is in default. This is a correct statement of law, but has no application to the present case. The two grounds of default relied upon by defendant are: (1) that plaintiff refused to play the role of "Hank" in the photoplay entitled "Fired Wife," (2) that plaintiff repudiated the contract by refusing to play in any pictures of

the type of "Fired Wife" or in which Lamont was a director. Plaintiff concedes the first breach and has incorporated a finding to that effect. The second alleged breach relied upon by defendant is completely unsupported by the evidence. If the isolated testimony of plaintiff referred to by defendant on pages 6, 7 and 8 of defendant's memorandum is read in its complete context and in the light of all the evidence, it is clear that the conversations of April 5 were confined solely to the dispute involving the photoplay "Fired Wife" and the promises in regard to said photoplay made by the studio to plaintiff. It is impossible to expand this testimony of plaintiff to matter outside this specific photoplay and thereby construe it as an unequivocal repudiation of the entire contract. Plaintiff has always admitted its breach in refusing to play the role of "Hank" in "Fired Wife" and admitted that defendant could have terminated the contract therefor under the express option reserved by defendant in the contract itself. Defendant did not do so, but in lieu thereof suspended plaintiff pursuant to its contractual option for the period during which said role was completed by another person. The propriety of the suspension was and is conceded by plaintiff, but when said role was completed the breach was at an end and plaintiff has paid the penalty therefor. [313] At the time plaintiff's demand for salary was refused, he was no longer in default.

2. Defendant's discussion of the issue of availability has already been fully argued, both orally and in written briefs. There was no breach of plaintiff's contractual obligation of availability since the contract does not require plaintiff's constant physical presence in Los Angeles. The uncontradicted evidence shows that plaintiff was never more than five and a half hours traveling time

by automobile from Los Angeles; that he could always be contacted by telephone and that his agent, Oscar Cummins, to whom the studio was directed to serve notices, maintained telephone contact with plaintiff during all the times that plaintiff was not physically in Los Angeles (Tr. page 325). The case of *May vs. New York Motion Picture Corp.*, 45 C. A. 396, cited by defendant on page 10 of its memorandum, has already been considered in previous briefs wherein it was shown that in that case the studio specifically ordered the actress to appear at the studio every morning at 8:30 o'clock A. M. The issue involved in the *May* case is succinctly stated by the court on page 401 of the opinion:

"Whether this order is consistent with the written contract of employment, and whether it is a reasonable order, are the principal questions presented on this appeal."

The court there correctly held that this was a reasonable order under the contract and that the actress there breached her contract by refusal to comply with said order. There was no such order in the present case, and in the absence thereof plaintiff was under no obligation to physically appear at the studio every day or to physically remain in Los Angeles every day in order to be "available" under the terms of the contract. The only order in the present case was contained in the telegram referred [314] to as the telegram of April 10, which was never delivered to plaintiff and which, in any event, was not a continuing order to appear at the studio every day but only ordered plaintiff to appear on April 12.

That both parties themselves construed the contract as not requiring plaintiff's physical presence in Los Angeles

is conclusively borne out by the transcript. Brief reference may be made to defendant's contention that the issue of waiver cannot be considered because plaintiff did not plead it: (1) plaintiff has from the beginning contended that it never breached the obligation of availability. Plaintiff could not have pleaded a waiver of the breach without admitting the breach; (2) defendant itself raised the issue of availability (and did so only in the last days of trial) as a defense. The same is therefore deemed denied. Plaintiff is not required to anticipate a defense. Defendant's further contention on page 11 of its memorandum that there could be no waiver because it nowhere appears in the testimony that defendant had knowledge of the fact that plaintiff's activities in the C. A. P. would require his presence outside of Los Angeles is contradicted not only by the transcript generally but by the testimony of Mr. Muhl as quoted by defendant itself on page 13 of its memorandum:

"On cross-examination Mr. Muhl testified that on one occasion prior to April 10, 1943, he had seen Robert Cummings in uniform on the C. A. P. and that he knew Cummings was in the C. A. P. for some time prior to April 10; also Cummings had told him 'some of his experiences.'" (Underscoring ours.)

This testimony of Mr. Muhl itself admits that Cummings told him of his various activities in the C. A. P. [315]

3. Defendant's contention that by application of the doctrine of constructive notice, the telegram of April 10 was delivered on Sunday, April 11, can not be sustained. The theory is that plaintiff, having knowledge of the fact that defendant attempted to deliver a telegram to him,

was under a duty to learn its contents. First, this legal conclusion is based upon facts contrary to the uncontradicted testimony in the case. Not only is there no evidence in the case to the effect that neither plaintiff nor his agent knew of the studio's attempt to deliver the telegram of April 10, but all the evidence is to the contrary. The testimony of plaintiff referred to on pages 16 and 17 of defendant's memorandum, even when construed most strongly against plaintiff, does no more than indicate that he could not remember hearing of such telegram and really indicates his sincere attempt to recall the truth. In addition, the testimony of his agent, Oscar Cummins, unequivocally shows that the existence of the telegram was not known. There being no knowledge of the telegram in the first place, defendant's theory of imputing the contents thereof to plaintiff by the doctrine of constructive notice must fall. Secondly, as has already been fully argued, a proper construction of the contract places the burden upon the defendant studio to notify and direct plaintiff to perform, and the law properly applicable in this situation is that the party preparing and sending the notice takes all the risks of any defects and misconstruction thereof by the receiver. The duty was therefore on defendant and not on plaintiff.

4. Defendant's contention that even though the studio's refusal to pay plaintiff's salary was a breach the latter was not thereby justified in quitting his employment is contrary to law.

(a) Plaintiff not only lacks the temerity to question the wisdom of the great Justice Cardozo or the principles of law he has enunciated in the case of *New York Life Insurance Co. vs. [316] Viglas*, 297 U. S. 672, 80 L. Ed. 971, cited by defendant, but readily accepts the same. How-

ever, the learned justice with equal profundity has himself distinguished that case from the case at bar. The first distinction is contained on page 674 of the opinion (80 L. Ed.) wherein Justice Cardozo states:

“Upon the showing made in the complaint there was neither a repudiation of the policy nor such a breach of its provisions as to make conditional and future benefits the measure of recovery.” (Underscoring ours.)

In the case at bar plaintiff is not seeking future benefits or full damages under the contract based on the theory of anticipatory breach but is merely seeking to be relieved of further performance by reason of the refusal to pay his salary. The latter principle is established in California by the case of *Percival vs. National Drama Corp.*, 181 Cal. 631, heretofore cited by plaintiff, which specifically holds that in an employment contract a repudiation of the contract is not necessary to entitle plaintiff to quit his employment, but that mere failure or refusal to pay his salary is sufficient. This fundamental principle of the law of master and servant is also set forth in 39 Corp. Jur. 79, Section 77:

“The neglect or refusal by the employer to pay the agreed compensation will justify an abandonment by the servant.”

Defendant has cited no authority involving employment contracts to the contrary.

Even where future benefits are sought as the measure of recovery, Justice Cardozo sets forth a second limitation upon the doctrine of the *New York Life Insurance Co.* case. On page 976 (80 L. Ed.) it is stated: [317]

“We have no thought to suggest an invariable rule whereby the full value of a bargain may never be recovered for any breach of contract falling short of repudiation or intentional abandonment. All depends upon the circumstances. *Helgar Corp. v. Warner’s Features*, 222 N. Y. 449, 452-454, 119 N. E. 113. There may be times when justice requires that irrespective of repudiation or abandonment the sufferer from the breach shall be relieved of a duty to treat the contract as subsisting or to hold himself in readiness to perform it in the future. *Roehm v. Horst*, *supra* (178 U. S. 17, 18, 44 L. ed. 960, 20 S. Ct. 780); *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 487, 33 N. E. 561. Generally this is so where the contract is a bilateral one with continuing obligations, as where a manufacturer has undertaken to deliver merchandise in instalments.” (Underscoring ours.)

In the New York Life Insurance case nothing remained to be done under the contract but the payment of insurance benefits. In such a case the plaintiff is not harmed by a refusal to accelerate its future benefits under the contract. In the case at bar, plaintiff would be required to continue performance by the rendition of services and the latter situation is specifically excluded from the doctrine of the New York Life Insurance Company case. The reason for the distinction is stated by Justice Cardozo on page 976 (80 L. Ed.):

“On the other hand, a party to a contract who has no longer any obligation of performance on his side but is in the position of an annuitant or a creditor exacting payment from a debtor, may be compelled to wait for the instalments [318] as they severally

mature, just as a landlord may not accelerate the rent for the residue of the term because the rent is in default for a month or for a year.”

(b) The breach in the case at bar is material. The authorities and arguments of defendant on the point of materiality are inapplicable since they do not involve master-servant contracts but involve commercial contracts of a separable and divisible nature. An employment contract, as in the case at bar, is entire and indivisible. In the California Supreme Court case of *Seymour v. Oelrichs*, 156 Cal. 782, at page 802, this principle is specifically set forth:

“A contract of employment for a year for a certain sum per week, payable weekly, is entire and indivisible, and only one action for the breach thereof can be maintained by the discharged employee.”

The failure or refusal to pay an employee salary is therefore a material and substantial breach. As the court has already pointed out in its opinion, plaintiff's salary was his most important right under this contract of several thousand words. Repudiation of the entire contract is not the only form of material or substantial breach.

(c) Although defendant does not have to go so far as to establish a repudiation of the contract as contended by defendant, the evidence in the case at bar shows such a repudiation in that defendant wilfully refused payment of the salary after demand therefor and continued and persisted in such wilful and wrongful refusal.

(d) California Civil Code, Section 1765, which is the Uniform Sales Act, does not overrule the master-servant

principle enunciated in the Percival case as defendant contends: (1) the Uniform Sales Act is confined to sales of goods and has no effect upon employment contracts; (2) even in sales cases, the [319] statute states that the buyer's rights "depends in each case on the terms of the contract and the circumstances of the case." (Under-scoring ours.) Under the terms and circumstances involved in the present case the breach was certainly material.

Plaintiff respectfully submits that plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment be accepted.

Respectfully submitted,

ROTH & BRANNEN

By Lester Wm. Roth

Attorneys for Plaintiff

Received copy of the within Answer this 9th day of May, 1944. Joseph L. Lewinson, attorney for defendant.

[Endorsed]: Filed May 9, 1944. [320]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER OF DISMISSAL AND JUDGMENT ON THE PLEADINGS.

To the Above Named Plaintiff, and to Messrs. Roth and Brannen, and Joseph J. Cummins, Esquire, His Attorneys:

You, and each of you, will please take notice that on Monday, May 22, 1944, at the hour of 10:00 o'clock A.

M., or as Z321] soon thereafter as counsel may be heard, we will appear before the Honorable Harry A. Hollzer, a judge of the above entitled Court, in the room usually occupied by him as a court room in the United States Post Office and Court House Building, at Los Angeles, California, and then and there move the Court for an order dismissing the First and Second Causes of Action attempted to be alleged in the complaint on file, on the ground that said alleged causes of action, and each of them, fail to state a claim upon which declaratory, or any, relief can be granted; and we will further move the Court for judgment on the pleadings on the Fourth Cause of Action attempted to be alleged in said complaint, on the ground that said alleged cause of action fails to state a claim upon which any relief can be granted.

Said motions will be made on the complaint on file, on the pleadings responsive to the alleged Fourth Cause of Action, and upon the evidence heretofore taken in said cause.

Dated May 10, 1944.

LOEB AND LOEB
JOSEPH L. LEWINSON

By Joseph L. Lewinson
Joseph L. Lewinson

Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed May 10, 1944. [322]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer's Calendar,

August 21, 1944.

Following the trial and submission of this cause upon the first two counts of the complaint—the third count having been dismissed, and the parties having stipulated to suspend proceedings on the fourth count—and after appraising the evidence and giving consideration to the legal issues involved, the Court filed a rather comprehensive memorandum of conclusions. As indicated in said memorandum, the Court concluded that plaintiff was entitled to recover upon the first and second counts of the complaint.

Thereafter counsel for plaintiff submitted proposed findings and judgment. Subsequently counsel for defendant filed objections and amendments to such proposed findings and judgment. Still later there was presented on behalf of defendants a motion for an order dismissing the first and second counts and also a motion for judgment on the pleadings on the fourth count of the complaint, said motions being made on the complaint, also on the pleadings responsive to the fourth count of the complaint, and upon the evidence taken at the trial.

As the record discloses, the counsel who represented [331] defendant at the trial of this cause did not attend the various proceedings heard preliminary thereto, and likewise the counsel who argued the aforementioned motions on behalf of defendant attended neither the trial

nor said preliminary proceedings. Near the close of the argument upon said motions, the Court called attention to a portion of its memorandum of conclusions wherein, at page 44, there was quoted a statement made by defense counsel during the course of the oral argument at the close of the trial. That quotation read as follows:

"Now there is of course a very decided conflict in the evidence with respect to what was said both on April 3rd and April 5th. The plaintiff denies that he said that he was going into the Civil Air Patrol, or the Army, for the duration on April 3rd. I think that is the only real controversy with respect to that conversation. Generally speaking, the parties, that is, Bob Speers and Bob Cummings, agree on the general substance of that conversation. Then we come, of course, to the more important conversation of April 5th on the telephone. In that respect, Bob Speers, refreshing his recollection from the memorandum made three months later, said that the following Monday he had a telephone conversation with Robert Cummings in which he stated that he had made up his mind not to do the picture because he felt it was his duty to give 100% of his time to war work and therefore was signing up with the Civil Air Patrol for the duration. Here again we have a direct conflict in the evidence. To my mind, the credibility of Bob Speers is an important [332] issue in the case because everything flows from that conversation of April 5th. If Robert Cummings didn't make that statement our affirmative defense of estoppel goes right out of the window."

Following the quotation of the foregoing excerpt, the Court commented: "My idea in calling attention to this is to ask counsel now arguing the motions as to what

meaning you make of that statement." Thereupon, the following colloquy took place:

"Mr. Lewinson: That last sentence, I think, is ill-advised, to say the least, and should be withdrawn, and is hereby withdrawn.

"The Court: You don't think it was a sound statement on the evidence and on the law?

"Mr. Lewinson: Certainly not, your Honor. No; it certainly wasn't.

"The Court: To make my point clear, I recognize that counsel should not, as it were, be foreclosed from asserting what is the law or what is the final conclusion to be drawn from the evidence, but what I had in mind in calling this to the attention of counsel this morning is that it purports to state a position—

"Mr. Lewinson: Well, the position is not well taken. It concedes too much, and I can see where it very well might have misled the court. The rest of the statement, if I may put it in this cold and not too complimentary way, isn't half bad. It isn't too accurate, but the fact is, your Honor, as I indicated in my opening argument, Bob Speers and Muhl, and [333] the memoranda that they offered in support of their position, did stress the matter of the Civil Air Patrol. That is a thing that stuck out in their minds. I emphasized that this morning. There is a good deal in the testimony of Robert Cummings which explains that, because he said over and over again that he was going into the Civil Air Patrol and he said, also, that he couldn't play "Hank" for that reason. He put a sort of saving clause on the matter. But the point of the matter is this: The whole question here is on a different phase of the

case. Did Robert Cummings in effect give notice that he wasn't going on with the contract according to its terms? Whether it took the form of a statement that he was going into the Civil Air Patrol or the form that he didn't like the director and wouldn't play under that director, or he didn't like his associates or didn't like money-making pictures, or various other reasons, is immaterial. The ultimate fact is, did he renounce and repudiate the contract? I think his own evidence and the evidence of his agent, disregarding entirely the version of the conversation given by Speers and Muhl, shows that he did repudiate the contract.

"I am glad your Honor brought this matter up, because I think it was impliedly withdrawn by the position that I took; now it is expressly withdrawn." [334]

Again, it should be noted that at the trial counsel then representing defendant was unwilling to accept certain views advanced by defendant's original counsel, who had appeared in support of its application for an injunction pendente lite.

In addition, we believe it to be appropriate to call attention to certain comments made by the Court following the oral arguments of counsel at the close of the trial. Upon that occasion we stated in part:

"And I think, as defense counsel very frankly stated a few moments ago, that at least during the conversation between the plaintiff and Speers that antedated the sending of the telegrams of April 10th, it could not fairly be charged that the plaintiff was seeking to break the contract by, in effect, threatening that unless he got a new deal from the defendant

he would give all of his time either to the Civil Air Patrol or to some other military service.

"I think it is also fair to say that the plaintiff, so far as anything disclosed in the courtroom may be considered, including his testimony, both direct and cross, has evidenced no feeling of either ill-will or of resentment or of anger against any of the defendant's executives. His manner, his attitude on the stand, his demeanor, as we call it, has impressed me as rather exceptional in that regard, and particularly because of the contrast which has been displayed by some of the witnesses on the stand. If my appraisal of these witnesses is sound, I cannot say that Speers was equally [335] charitable, and, before reaching a conclusion as to how much credence to give to certain of the defendant's witnesses, as I have already indicated, I want to examine painstakingly the copies of the memoranda from which they testified."

These changes with respect to counsel perhaps account for the varied positions taken at different stages of this cause by the defense, and possibly also explain the difficulty the latter seemingly has experienced in arriving at what we regard as a correct appraisal of the record.

Be that as it may, we are persuaded that the interpretation of the record, which defendant has advanced in support of the motions now under consideration, and also as the basis of its objections and amendments to the proposed findings and judgment, is erroneous.

Having heard the witnesses, and after applying the pertinent rules governing the determination of their credibility and what weight should be accorded to their testi-

mony, it is our conclusion that the only breach of contract committed by plaintiff consisted of his refusal to perform the role of "Hank" in the photoplay "Fired Wife." The contract involved herein gave to defendant, in the event of such a breach, certain remedies, provided it chose not to resort to the remedy arising as a matter of law, namely, to terminate the agreement. Admittedly, it took the position that the contract would remain in full force and effect. Under such circumstances, plaintiff's right to a resumption of compensation upon the completion of said photoplay, and defendant's obligation to pay the same, likewise were preserved. [336]

The latter obligation was breached by defendant. As pointed out in our prior memorandum of conclusions, this was the most important obligation owing to the plaintiff under the agreement. Concededly, defendant not only failed to pay such compensation, but also took the position that it was not required to pay the same for the duration of the war. In an effort to justify its course, defendant has sought to place upon plaintiff's statements and acts, and those of his agent, an unreasonable interpretation. It has endeavored to give to the contract a construction different from that which the parties had placed thereon by their own acts and conduct.

We are convinced that the defendant's failure and refusal to pay compensation to plaintiff subsequent to the completion of the photoplay "Fired Wife" constituted a material breach of the agreement, and that the conclusions set forth in our prior memorandum should not be set aside. Accordingly, plaintiff is entitled to an order denying defendant's motions, and is further entitled to have the findings and judgment signed and filed.

Copies to counsel.

[Endorsed]: Filed Aug. 21, 1944. [337]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of August in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 3242-H Civil

Robert Cummings,

Plaintiff,

vs.

Universal Picture Company, Inc., a corporation,

Defendant.

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that defendant's motion for an order dismissing the first and second counts of the complaint, and also defendant's motion for judgment on the pleadings on the fourth count thereof, be denied.

It is further ordered that defendant's objections and amendments to plaintiff's proposed findings and judgment be overruled. [338]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Heretofore and on January 4, 1944, the above entitled action came on regularly for trial before the Honorable Harry A. Hollzer in the above entitled court, sitting without a jury, plaintiff being present in person and by his counsel, Roth & Brannen by Lester Wm. Roth and Joseph J. Cummins, and defendant being present by its counsel, Loeb & Loeb by Grant Cooper, and it having been stipulated at the outset of the trial by the parties through their respective counsel that the primary issues for decision were comprised within the first and second causes of action of plaintiff's complaint and the answer of defendant, as [339] amended, and that if the court should decide said causes of action in favor of plaintiff that it would be unnecessary to try the fourth cause of action, and the third cause of action having been dismissed by plaintiff, and it further having been stipulated by the parties through their respective counsel that the motion for summary judgment heretofore made by plaintiff and the motion for injunction pendente lite heretofore made by defendant need not be argued or presented, and counsel for defendant having stated in open court that the motion for injunction pendente lite was moot and plaintiff having stated that the motion for summary judgment would of necessity be decided by the trial of said first and second causes of action, and it having been thereupon decided by said court that said motions and each of them go off calendar and said trial having been heard from day to day on January 4, 5, 6, 7, 10 and 11th and evidence both oral and documentary having been submitted on behalf of each of said parties

and the matter having been fully argued by counsel for the respective parties, orally and in briefs, and having thereupon been submitted to the court for its decision and said court now being fully advised in the premises, does hereby make its findings of fact and conclusions of law.

On the first cause of action the court finds that the following facts are true:

(1) Defendant is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is now, and was at all times hereinafter mentioned, qualified to do business in the State of California, with its principal office for the transaction of business in the City of Los Angeles, County of Los Angeles, State of California.

(2) On or about November 21, 1938, plaintiff and defendant entered into a written contract, a copy of which, as [340] originally executed, is annexed to the complaint marked Exhibit "A." Since November 21, 1938, said contract has at various and sundry times been amended by said parties, as per five amendments attached to the stipulation of facts on file herein marked Exhibit "A" and Exhibit "B." The said contract dated November 21, 1938, as amended, will hereinafter in these Findings be referred to as "the contract" or "said contract."

(3) On or about April 10, 1943, defendant demanded of plaintiff that plaintiff portray the role of "Hank" in a photoplay then entitled "Fired Wife." Plaintiff refused to and did not comply with said demand. Thereafter, on April 15, 1943, defendant served a written

notice upon plaintiff refusing to pay said plaintiff compensation. Said notice is as follows, to-wit:

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

April 15, 1943

Registered Mail

Mr. Robert Cummings

14111 Sherman Way

Van Nuys, California

Dear Mr. Cummings:

This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your contract of employment with us dated November 21, 1938, as heretofore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943 in accordance with our notice to you dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect. [341]

At the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to-wit: the role of 'Hank' in the photoplay now entitled 'Fired Wife'. By reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to and do hereby

exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl

By Edward Muhl

epw:vv

Assistant Secretary."

(4) The role of "Hank" in the photoplay then entitled "Fired Wife" was completed by the person who had been substituted for plaintiff to portray such role on May 19, 1943.

(5) On May 18, 1943, defendant served a second written notice upon plaintiff advising plaintiff that by reason of his refusal to play the role of "Hank," and his suspension as a consequence of said refusal, that the term of said contract had been extended for a period of five weeks and two days commencing April 12, 1943, and advising plaintiff that he was being further suspended. Said written notice is as follows, to-wit: [342]

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

May 18, 1943

Registered Mail

Mr. Robert Cummings

c/o Mr. Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California

Dear Mr. Cummings:

Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five (5) weeks and two (2) days commencing April 12, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect.

Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies

which we may have in the premises, all such other rights and/or remedies being expressly reserved [343] by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl
jab/j

By Edward Muhl
Assistant Secretary."

(6) Between the dates of April 10, 1943, and May 18, 1943, both inclusive, plaintiff received no notices of any kind or nature from defendant other than the two above pleaded. No demand, oral or written, was made by defendant at any time after April 10, 1943 that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract.

(7) It is not true that on April 10, 1943, defendant delivered to plaintiff any telegram or specifically the following telegram:

"You are hereby instructed to report at our studio at Universal City, California, at the office of Mr. Dan Kelley, at 10 o'clock Monday morning, April 12 for the rendition of your services under your contract of employment with us dated November 21, 1938, as heretofore amended and extended in connection with the portrayal of a role in our photoplay now entitled 'Fired Wife' and/or the rendition of such other services as we may require under said contract, as amended and extended."

It is true that on Saturday, April 10, 1943, one Speers, an employee of defendant, instructed his secretary to deposit with Western Union Telegraph Co. three telegrams, each addressed to the plaintiff and bearing the date last mentioned and that each of said telegrams, ex-

cept as to the address thereof, was worded identically as the telegram above quoted. Said telegrams were addressed as follows: [344]

One of these telegrams was addressed:

“Mr. Robert Cummings
Care Oscar Cummins
8511 Sunset Boulevard
Los Angeles, California.”

Another telegram was addressed:

“Mr. Robert Cummins
Care Oscar Cummins
527 California Bank Building
Beverly Hills, California.”

The third telegram was addressed:

“Mr. Robert Cummings
14111 Sherman Way
Van Nuys, California.”

It is true that on the same day at approximately six o'clock P. M. Speers' secretary left these telegrams at the Beverly Hills office of the telegraph company and that at about 10 A. M. of the following day, Western Union telegraphed defendant to the effect that the locations described respectively, 8511 Sunset Boulevard, etc., 527 California Bank Building, etc. were closed until morning and also that the person addressed at 14111 Sherman Way, etc. was out of the city and his address unknown and that the telegraph company had telephoned to Mrs. Oscar Cummins who would relay the message, and further that on Monday, April 12, at about 6 P. M. the telegraph company wired defendant to the effect that the telegram addressed to 527 California Bank Building, Beverly Hills,

Calif. had been telephoned on the preceding morning to the addressee's sister-in-law who would relay the message to him. None of the telegrams was delivered in the customary manner either to plaintiff or to his agent or in fact to any one purporting to be in contact with plaintiff.

(8) The only notice received by plaintiff from de- [345] fendant to report at the studios of defendant was an oral notice some days prior to or on or about April 10, 1943, requiring plaintiff to report at the studios of defendant on April 12, 1943, for the purpose of portraying the role of "Hank" in "Fired Wife." The telegrams above set forth were not delivered to plaintiff as required by the contract or otherwise, and plaintiff was never advised in writing, or otherwise, that defendant required plaintiff to report at the studios of defendant or at the office of Dan Kelly on the premises of defendant at 10:00 o'clock A. M. on the morning of April 12, 1943, or anywhere else for the rendition of services other than the portrayal of the role of "Hank" which might be required by defendant of plaintiff under the contract. And defendant, in fact, did not require plaintiff to report to its studios or to the office of Dan Kelly at 10:00 A. M. of April 12, 1943, or anywhere else, for the rendition of any services other than the portrayal of the role of "Hank" in the photoplay production "Fired Wife."

(9) No lay-off time was available to defendant at the time plaintiff was placed upon suspensions and none of the suspensions ordered by defendant were ordered because of any lay-off time to which defendant was entitled.

(10) On May 26, 1943, plaintiff, pursuant to the terms and provisions of said contract, appeared at the offices of the defendant and demanded of defendant pay-

ment of salary as fixed by said contract for that portion of the week beginning May 20, 1943 and ending May 22, 1943. Said contract provides that the payment of weekly salary by defendant to plaintiff be made on Wednesday of each week for services rendered in the preceding week from Monday to Saturday, both inclusive, or for any part of such preceding week. Defendant, at said time, to-wit, on May 26, 1943, failed and refused to pay salary to plaintiff in accordance with said contract and the demand of plaintiff and did not at said time, [346] and has not at any time since, nor has anyone on behalf of defendant, paid said salary to plaintiff in accordance with said contract and said salary has not been paid.

(11) Defendant's refusal and failure to pay salary to plaintiff for that portion of the week beginning on May 20th and ending on May 22nd, both dates inclusive, pursuant to the demand of plaintiff made on May 26, 1943, as aforesaid, constituted a material breach of said contract and plaintiff did promptly, and on May 29, 1943, advise defendant in writing of said material breach and his election to terminate said contract by reason of [347] said breach, said written notice from plaintiff to defendant being as follows, to-wit:

"Universal Pictures Co., Inc.
Universal City, California

May 29, 1943

Under date of May 18, 1943, you notified me that you considered my contract with you dated November 21, 1938, suspended for a period of 5 weeks and 2 days, commencing April 12, 1943, and you purported to exercise a right of extension with respect to said alleged suspension.

Under second paragraph of said letter, you state that said contract is further suspended after the expiration of said period because of my purported failure, refusal and/or neglect to perform my obligations thereunder. As you are well aware, there has been no failure, refusal and/or neglect of my part to perform my obligations under said contract at any time since the expiration of said period of 5 weeks and 2 days, assuming, without admitting, that there was such a failure with respect to said period of 5 weeks and 2 days. Assuming that you had the right of suspension for said period of 5 weeks and 2 days, such suspension would have ended on May 18, 1943. Accordingly, compensation was payable to me under said contract for the period after May 18, 1943. On May 26, 1943, (on which date compensation under said contract was payable to me), at or about 2:30 P. M., demand was made upon you for the payment of the compensation due and payable on said date.

At said time, you failed and refused to pay me the compensation which was due and payable under said [348] contract. Such failure and refusal was a material breach by you of your obligations under said contract and I hereby notify you that I elect to and do hereby terminate said contract by reason of such failure and refusal.

This notice is served upon you without prejudice to or waiver of any other rights and/or remedies which I may have in the premises, all such other rights and/or remedies being expressly reserved by me.

ROBERT CUMMINGS"

(12) Thereafter, on June 2, 1943, defendant advised plaintiff in writing that it did not consider said contract terminated and that it did not consider that there had been any breach of said contract. Said notice from defendant to plaintiff, being as follows, to-wit:

"UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

June 2, 1943

Registered Mail

Mr. Robert Cummings

c/o Oscar Cummins

9441 Wilshire Boulevard

Beverly Hills, California.

Dear Mr. Cummings:

This is to acknowledge receipt of your telegram of June 1, 1943.

Please be advised that despite your purported termination of your contract with us, dated November 21, 1938, we will continue to treat and consider said contract as being in full force and effect. [349]

In our notice to you under date of May 18, 1943, we notified you that your employment under said contract, as amended, would be further suspended during the continuance of your failure, refusal and/or neglect to perform your obligations thereunder.

At no time since April 12, 1943, up to and including the present time, have you notified us of your willingness to perform pursuant to terms of said contract, as amended. If you are willing to resume your services under said contract, as amended, please notify Mr. Muhl at our studio, and upon your

reporting pursuant to such notification, we will terminate the suspension of your employment. Failing such notification by you, your employment will continue in suspension during the continuance of your present failure, refusal and/or neglect to perform your obligations under said contract, as amended, and until you do report ready to resume and perform your services under said contract, as amended.

We reserve the right to extend your employment under said contract, as amended, for a period equivalent to the period of such suspension, and this notice is served upon you without prejudice to or waiver of any other rights and/or remedies which we may have in the premises, all such other rights and/or remedies being expressly reserved by us.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

Edward Muhl

By Edward Muhl

jab/j

Assistant Secretary" [350]

(13) Since May 29, 1943, there has been an interchange of notices and letters from defendant to plaintiff and from plaintiff to defendant, the purport of which is that defendant claims that said contract still exists and subsists between plaintiff and defendant, and plaintiff claims that said contract, by reason of the material breach of defendant as herein alleged, has been terminated by plaintiff as of May 29, 1943, and no longer exists between them. All of the written notices which are appended to, and made a part of the complaint of plaintiff, the answer and/or amended answer of defendant, the affidavit of plaintiff filed in connection with the Motion for Summary Judgment and the Motion for Temporary Restraining Order are authentic and were sent by

defendant and received by plaintiff, or sent by plaintiff and received by defendant, as the case may be. Since the filing of the above action defendant has sent, and plaintiff has received, two other notices dated respectively November 15, 1943 and December 20, 1943, both of which are appended to the Stipulation of Facts and marked Exhibit "B" thereto.

(14) Prior to the commencement of the above entitled action an actual controversy did exist between said parties, and it was and is necessary for the court to declare the rights of said parties arising from the facts which are herein found and which were heretofore alleged, the plaintiff having asserted and still claiming that by reason of the facts heretofore and herein found said contract was terminated as of May 19, 1943, and the defendant having asserted and still contending, among other things, that some of the facts theretofore alleged and herein found to be true were not true and, that even if true, said contract still existed between plaintiff and defendant.

On the second cause of action, the court finds the [351] following facts to be true:

(1) The findings of the first cause of action contained in Paragraphs 1 to 11, both inclusive, are hereby repeated and set forth as findings in the second cause of action, as fully as if set out herein at length.

(2) Under the terms of said contract, defendant is indebted to plaintiff for salary and compensation earned by plaintiff for that portion of the week beginning May 20, 1943 and ending May 22, 1943, both dates inclusive, and for the week beginning May 24, 1943 and ending May 29, 1943, both dates inclusive, in the sum of \$2,250.00.

(3) Prior to the commencement of the above entitled action, and specifically on May 26, 1943, plaintiff did make demand of defendant for the payment which had become due to plaintiff under the terms of said contract for that portion of the week beginning May 20, 1943 and ending May 22, 1943, but defendant failed, refused and neglected to pay said sum or any part thereof, and did not pay the sum thereafter that accrued to plaintiff for the week beginning May 24, 1943 and ending May 29, 1943, under the terms of said contract, the sum of \$1,500.00, and prior to the commencement of said action demand was made for said sum of \$1,500.00 and defendant failed, refused and neglected to pay said sum of \$1,500.00 or any part thereof, and the same has not nor has any part thereof been paid.

In respect of the answer and all amendments thereto and all special and separate defenses, formally pleaded and/or in respect of which evidence was adduced, the court finds as follows:

I.

All allegations of the answer, all amendments thereto and all allegations of all special and separate defenses [352] are untrue, except as hereinbefore or hereinafter specifically found to be true.

II.

It is true that on or about April 3, 1943 plaintiff informed defendant that he was on the verge of refusing the part in the picture "Fired Wife" because he was unhappy about the selection of the director and the cast of the picture. It is not true that on April 3, 1943 or at any other time plaintiff informed defendant that he would not do the part in the picture "Fired Wife" because

he was seriously thinking of signing up with the Civil Air Patrol, or the army, for the duration of the war. It is true that on or about April 5, 1943, plaintiff informed defendant that he had made up his mind not to do the picture. It is not true that on or about April 5, 1943, or at any other time, plaintiff informed defendant that he made up his mind not to do the role of "Hank" in the picture "Fired Wife" or not to do the said picture because he felt it was his duty to give 100% of his time to war work and that he was signing up with the Civil Air Patrol for the duration.

It is true that for approximately one year prior to April 5, 1943, defendant was aware of the fact that plaintiff was a flyer and devoted part of his time to the Civil Air Patrol and upon a number of occasions officers and employees of defendant had observed plaintiff wearing the uniform of the Civil Air Patrol on the premises of defendant.

It is not true that on April 13th defendant informed plaintiff's exclusive agent, personal representative and lawyer, Oscar Cummins, that defendant had theretofore been informed by plaintiff personally that he, plaintiff, was going to join or had joined the Civil Air Patrol for the duration. It is true that on or about April 13, 1943, defendant informed said Oscar Cummins that plaintiff had informed defendant that he would not report for [353] his role in the production of the photoplay "Fired Wife" and that plaintiff did fail, refuse and neglect to report on April 12, 1943 pursuant to defendant's telegram of April 10 or otherwise and that defendant informed said Oscar Cummins that in order to establish a clear position defendant intended to suspend plaintiff from the payroll as of that date and it is true that said Oscar Cummins acted in the capacity of plaintiff's exclusive agent, per-

sonal representative and lawyer and at said time informed defendant that such action was proper, that he said Oscar Cummins was sick at the situation also that he had talked to plaintiff on the preceding night and was trying to get him to come in for further discussion with Speers and Muhl, and that if plaintiff did not he understood that defendant would have to suspend plaintiff but that he the said Oscar Cummins suggested that the problem could be solved by having another director assigned to the picture and that he would like to straighten it out. It is not true that defendant advised said Oscar Cummins that it had been informed by plaintiff that he was going to join or had joined the Civil Air Patrol for the duration and would not for that reason report for the production of the photoplay "Fired Wife" and it is not true that said Oscar Cummins said in response to said statement of defendant that such action was entirely proper and that he the said Oscar Cummins was endeavoring to have plaintiff come into defendant's studio to discuss the situation with defendant's assistant secretary and casting director.

III.

It is not true that as a direct result or any result of plaintiff's representations and/or conduct as alleged in defendant's answer and/or any of its amendments or as a direct result or any result of any plaintiff's representations and/or conduct defendant believed that it was plaintiff's intention to devote 100% of his time to the Civil Air Patrol or to the U. S. Army or other [354] similar pursuits other than his obligations under the contract and would not report to defendant under the terms and provisions of said contract or report to the defendant at all and it is not true that defendant believed it would be a useless and idle act to make plans and expend money for

the preparation of productions and roles in which plaintiff's unique and artistic talent would fit and it is not true that defendant believed it would be a useless and idle act to offer further roles to plaintiff until plaintiff informed defendant that he had changed his plans or was willing to comply with the terms and conditions of his contract. It is true that on the expiration of May 19, 1943, the suspension of plaintiff by reason of his failure, refusal and neglect to report to the studio on April 12, 1943 had terminated, and that defendant did, after the expiration of the 19th day of May, 1943, have full and complete right to require plaintiff to perform his obligations under his contract and that upon the expiration of said 19th day of May, 1943, plaintiff's rights to compensation under said contract were fully restored.

IV.

It is not true that defendant relied on the representations or conduct of plaintiff as set forth and alleged in its answer and/or any of the amendments thereto, and that because of said alleged representations and/or conduct, defendant did not make plans and did not expend money for the preparation of productions and roles in which plaintiff's unique and artistic talents would fit, or that defendant did not prevent further roles to plaintiff. It is not true that plaintiff acted or relied upon the said alleged representations or conduct of plaintiff or that to protect its rights, defendant under the contract served and delivered the notice of May 18, 1943. It is true that on or about May 18, 1943, defendant did serve upon and deliver to plaintiff a written notice as alleged in paragraph III of the first cause of action of plain- [355]

tiff's complaint, and it is true that upon the termination of May 19, 1943, the services of the substitute employed by defendant to take the place of plaintiff for the portrayal of the role of "Hank" in the production of the photoplay entitled "Fired Wife" were completed.

V.

It is not true that plaintiff had knowledge of any of the matters or things set forth and alleged by defendant in its answer, and/or any of the amendments thereto in respect of the alleged misrepresentations and/or conduct of plaintiff, and it is not true that plaintiff had any knowledge of any kind that defendant was at all times ready, willing, able or anxious to use plaintiff's services so that defendant might fulfill its obligations under the contract. It is true that plaintiff did believe from and after May 26, 1943, that defendant did not care to use his services and desired to keep plaintiff off of defendant's payroll for an indefinite period of time. It is not true that the demands of plaintiff for compensation were designedly or in bad faith made to the employees of defendant, and it is true that the demands for compensation made by plaintiff and on behalf of plaintiff were made to employees of defendant who had the authority and were empowered in the regular course of business to make payment of compensation to plaintiff earned by plaintiff under the contract between the dates May 20 and May 22, 1943, both inclusive. It is not true that the executive officers of defendant empowered to make payment or authorize payment of compensation to plaintiff were not aware of the demand for compensation made by plaintiff. On the contrary it is true that defendants and its duly authorized executive officers had notice of such demands for compensation.

VI.

It is not true that after April 5, 1943, the defendant did not know that plaintiff was holding himself available [356] or in readiness to perform all of his obligations under the contract or that the defendant did not know that plaintiff was at all times ready, willing, able and anxious to perform his services under said contract and to receive pay therefor, except that it is true as hereinbefore already found that plaintiff did advise defendant that he would not perform the role of "Hank" in the production of the photoplay "Fired Wife." At all times after April 5, 1943, defendant did have notice that plaintiff was willing to perform all of the services which defendant could require plaintiff to perform under the contract, except the role of "Hank" in the production of the photoplay "Fired Wife," and that on and after May 19, 1943, defendant had notice that plaintiff was ready, willing, able and anxious to perform all services that could be legally required from him by defendant under the contract.

VII.

It is not true that before plaintiff served the written notice of May 29, 1943, upon defendant as alleged in paragraph VIII of plaintiff's first cause of action, or that on May 27 and May 28, 1943, or at any other time, that plaintiff acting through his exclusive agent, personal representative and lawyer, or otherwise, did lull or continue to lull defendant into the belief and reliance that plaintiff was not holding himself available for services under his contract and was not demanding or expecting compensation as required by his contract, and it is not true that plaintiff through said exclusive agent, or otherwise, specifically or otherwise informed defendant, among other

things, or at all, that plaintiff was engaged in work in connection with the establishment of an air shuttle service and that if anyone wanted plaintiff, they would have to see General Arnold of the Army Air Corps to get him or that plaintiff, through said exclusive agent, or otherwise, made any statement whatsoever which could in any manner whatsoever, directly or indirectly, assert or [357] suggest to defendant that plaintiff was not ready, willing and able to perform all services that might be required of plaintiff under said contract.

VIII.

It is not true that at no time since April 10, 1943, did plaintiff intend to fulfill the terms and obligations of said contract (except in so far as the performance of the role of "Hank" in the photoplay "Fired Wife," as hereinbefore already found) or that at all times since said date plaintiff was devoting all his time to the Civil Air Patrol and as instructor for the Army Air Force Cadets at Mira Loma Flying Academy, Seventh Army Air Forces Flying Training Detachment at Oxnard, California, or in any other branch of the armed forces. It is true that for some months prior to April 10, 1943, defendant was attached to said Civil Air Patrol as a flyer and as an instructor with the full knowledge of defendant. It is also true that there was nothing in plaintiff's attachment to said service which prevented plaintiff from fulfilling for defendant the duties and obligations required of plaintiff under said contract. It is true that since July 16, 1943, plaintiff has been a member of the Air Force Reserve of the United States Army, but it is not true that by reason of said membership, plaintiff was at any time after July 16, 1943, in any way prevented or prohibited from performing his duties as required under said

contract. It is true that defendant has asserted a desire to respect any patriotic motive or desire on the part of plaintiff to serve his country and it is true that defendant has manifested its said respect and desire by raising no objection to the time devoted by plaintiff in the service of the Civil Air Patrol for many months prior to April 12, 1943, and has raised no objection to such time as plaintiff has devoted to the service of the Civil Air Patrol, or any other branch of the military activities of the United States of America, since April 12, 1943. [358]

IX.

It is not true that plaintiff is wholly without equity because of any of the facts alleged in defendant's answer, or any of the amendments thereto or otherwise, to invoke the aid of the court to terminate and rescind plaintiff's obligations to perform said contract. On the contrary, it is true that defendant is wholly without equity to invoke the aid of this court to prevent the termination and cancellation of said contract by plaintiff by reason of the default and conduct of the defendant as herein found.

X.

It is true that defendant has offered to fully pay and restore to plaintiff any sums of money or compensation that the court may find to be due to plaintiff by virtue of any mistake of fact, mistake of law, or for any other reason which may be shown to exist by the facts. It is also true that this offer of defendant was not interposed until a lapse of more than six months after the agreement had been broken and plaintiff had given notice of the termination thereof, and that throughout said period, to wit, from the date of plaintiff's notice to the date of the pleading of said defense, defendant had and has insisted

both that it was not obligated to pay plaintiff any compensation, and also that the agreement was still in effect and prohibited him from working for anyone else. Said offer to do equity was also conditioned upon the court first deciding that the money or compensation became due to plaintiff on or after May 26, 1943, and that only in the event that the court found such money to be due from defendant to plaintiff was defendant willing to do equity. The court in addition finds that defendant's failure and refusal to pay compensation to plaintiff on May 26, 1943, was not the result of mistake of fact, mistake of law, unavoidable accident, fraud, surprise or ignorance, but on the contrary finds that said refusal to pay was arbitrary and unwarranted. [359]

XI.

It is not true that plaintiff is estopped to claim a breach of the contract on the part of defendant.

XII.

It is not true that prior to or at the time of plaintiff's refusal to report to defendant at its studio on April 12, 1943, plaintiff had notified defendant to the effect that he had determined to devote 100% of his time to war work or particularly that he had signed up with the Civil Air Patrol for the duration of the war, and that as a consequence thereof he would not engage in the work of making motion pictures for the duration of the war.

XIII.

It is not true that from time to time from April 5, to May 28, 1943, inclusive, or at any other time, plaintiff, either in person or through his agent, represented to defendant, directly or indirectly, that he, the said plaintiff, expected to join the military service for the duration of

the war and that as a consequence of plaintiff's said desire, plaintiff would not report at defendant's studio to portray the role of "Hank" in the photoplay "Fired Wife" or for any other purpose, or that plaintiff continued as late as May 28 to lull defendant into the belief, personally or through any agent, directly or indirectly, that he was not available for services under the contract, and that on the contrary he was and would be engaged in work of a military character and that he did not intend to fulfill his obligations under the contract.

XIV.

It is not true that plaintiff was not available at all times continuously from May 19 to May 29, 1943, both inclusive, to perform such services as defendant might require plaintiff to perform under the contract. On the contrary, it is true that plaintiff was available continuously during all of said times to [360] respond to any proper notice which might have been served by defendant to perform for defendant such services as defendant might require of plaintiff under said contract.

XV.

It is true that on many occasions during the period of months prior to April 1943 and on a number of occasions after April 1943 that by reason of plaintiff's affiliation and participation in the operations of the Civil Air Patrol, plaintiff was frequently outside of the County of Los Angeles; it is also true, however, that all of plaintiff's activities in connection with the Civil Air Patrol were had with the knowledge, consent and encouragement of defendant and that such activities in no way interfered with the obligations of plaintiff to render services to defendant in accordance with the terms of the contract.

Conclusions of Law

Based upon the foregoing Findings, the Court makes the following Conclusions of Law:

I.

An actual controversy did exist between the parties in respect of the rights and obligations of said parties arising out of the contract dated November 21, 1938, as amended.

II.

Plaintiff committed a breach of said contract on April 12, 1943, and as a consequence of said breach defendant had the right to suspend plaintiff from April 12, 1943 for and during such period as was required for some person other than plaintiff to portray the role of "Hank" in the photoplay entitled "Fired Wife," and defendant had the further right to extend the period of plaintiff's contract for the period of said suspension and the further right to refuse to pay to plaintiff any compensation during the period of said suspension, to wit, the period required [361] by some other person to portray the role of "Hank" in the photoplay "Fired Wife."

III.

The period required for some person other than plaintiff to portray the role of "Hank" in "Fired Wife" was the period between April 12, 1943 and May 19, 1943, and plaintiff was therefore properly suspended for a period of five (5) weeks and two (2) days and defendant was within its rights in refusing to pay to plaintiff compensation for a period of five (5) weeks and two (2) days, and had the right to extend the term of plaintiff's existing contract for a period of five (5) weeks and two (2) days.

IV.

Defendant had actual notice and knowledge of plaintiff's activities with the Civil Air Patrol for several months prior to April, 1943, and from April, 1943 to and including the completion of the active trial of the within entitled action, and consented to and approved such activities, and the activities of plaintiff with the Civil Air Patrol during the period of several months prior to April, 1943 and thereafter did not interfere with the rendition of plaintiff's services to defendant in accordance with the contract.

V.

Plaintiff was engaged in no activities, military or otherwise, which interfered with the full and proper performance of his duties and obligations to defendant under the terms of the contract.

VI.

Defendant did not serve a written notice upon plaintiff on April 10, 1943 or at any other time to appear at the studios of defendant on April 12, 1943 at the hour of 10 o'clock A. M. for the purpose of portraying the role of "Hank" in a photo- [362] play to be produced entitled "Fired Wife." Defendant did, prior to April 10, 1943, and on or about April 10, 1943 orally give notice to plaintiff to appear at the studios of defendant on April 12, 1943 at the hour of 10 o'clock A. M. for the purpose of portraying the role of "Hank" in a photoplay to be produced entitled "Fired Wife" and plaintiff received said oral notice.

VII.

Defendant did not, on April 10, 1943, at any time prior to April 10, 1943, or at any time after April 10,

1943, serve notice upon plaintiff, written or otherwise, requiring plaintiff to appear at the studios of defendant in Los Angeles, California, at the hour of 10 o'clock A. M. on April 12, 1943, or at any other time for the purpose of rendering services to defendant other than portrayal of the role of "Hank" in the photoplay "Fired Wife" as defendant might rightfully require of plaintiff under the contract.

VIII.

There was no failure, refusal, or neglect upon the part of plaintiff to report to defendant for the rendition of his services at any time between April 10 and May 29 other than the failure, refusal and neglect of plaintiff to report to defendant on April 12, 1943 for the purpose of portraying the role of "Hank" in a motion picture production entitled "Fired Wife."

IX.

Upon the termination of plaintiff's suspension of five (5) weeks and two (2) days commencing from April 12, 1943, to wit: on May 19, 1943, plaintiff under the contract was on May 20, 1943 automatically restored to his rights under said contract and entitled to compensation, including and after said date.

X.

Plaintiff was at all times during the period immediately prior to April 1943 to and including May 29, 1943, [363] ready, willing, and able to render his services to defendant as required by said contract, except that plaintiff was not ready or willing to render his services to defendant for the purpose of portraying the role of "Hank" in the motion picture production entitled "Fired Wife."

XI.

There was no obligation upon plaintiff under the terms of the contract to make any statements to defendant upon the termination of his suspension by reason of his refusal to play the role of "Hank" in the motion picture production "Fired Wife" prior thereto or at any other time to state to defendant that he was ready, willing and able to perform services for defendant under said contract.

XII.

It was defendant's obligation under said contract if it desired to use the services of plaintiff to give notice to plaintiff of its said desire and in the absence of any such notice there was no duty upon plaintiff to assert to defendant the readiness, willingness or ability of plaintiff to render services.

XIII.

Plaintiff had the right to collect compensation under said contract from and after May 19, 1943 to and including May 29th pursuant to the terms of said contract and defendant was obligated to pay such compensation.

XIV.

Plaintiff did make a demand for a part of said compensation, to wit, compensation for the days of May 20 to 22 both inclusive on May 26, 1943 and defendant, contrary to the provisions of said contract, did not meet said demand and did not pay said compensation nor did anyone pay said compensation on defendant's behalf. Under the terms of said contract, a demand by plaintiff for said compensation was not necessary, and defendant [364] was obligated to pay plaintiff under the terms of said contract from and after May 19, 1943, without any demand for such payment by plaintiff.

XV.

Defendant's refusal to pay to plaintiff compensation with or without a demand by plaintiff on May 26, 1943, for the days of May 20, 21 and 22 and thereafter for the week of May 22 to May 29th, was unwarranted and arbitrary and constituted a breach of the contract in its substantial and material terms.

XVI.

There was no estoppel created against plaintiff nor was there an anticipatory breach of said contract by plaintiff by reason of the alleged statements purportedly made by plaintiff to defendant's agents that plaintiff intended to devote 100% of his time to war work, particularly to sign up with the Civil Air Patrol for the duration of the war, and defendant did not have the right to and in fact did not refuse to pay compensation to plaintiff by reason of said alleged statements, and defendant did not have the right to and in fact did not fail and refuse to pay plaintiff compensation or suspend plaintiff or extend the term of said contract by reason of said alleged statements.

XVII.

There was no estoppel created against plaintiff and in favor of defendant by reason of plaintiff's alleged statements and conduct from April 5, 1943 to May 28, 1943 to the effect that he would join the military service for the duration of the war, and would not report at defendant's studio to portray any role in which he might be cast by defendant, and defendant did not refuse to and did not pay compensation to plaintiff or suspend plaintiff or extend the term of said contract by reason of said alleged statements and/or its belief or reliance thereon. [365]

XVIII.

Defendant was not misled or lulled into any sense of security by plaintiff by any alleged representation or conduct of plaintiff or by anything said or done by plaintiff directly or indirectly and plaintiff is not estopped to terminate said contract by reason of any averments made by defendant in its answer as amended or in any separate defenses pleaded or asserted by defendant; and defendant did not fail to pay plaintiff compensation or suspend the services of plaintiff or extend the term of the contract by reason of being misled or lulled into a sense of security by plaintiff or by reason of any of the averments made by defendant in its answer as amended or in any of the separate defenses pleaded or asserted by defendant.

XIX.

Said contract between plaintiff and defendant did not require the continuous physical presence of plaintiff in Los Angeles County in order for plaintiff to be available to defendant, and plaintiff was at all times mentioned in the pleadings fully available to defendant under the terms and provisions of said contract. Plaintiff's temporary absence from Los Angeles County while rendering services for the Civil Air Patrol was with the knowledge and consent of defendant and did not interfere with plaintiff's availability to defendant.

XX.

Defendant is not entitled to any relief by reason of its alleged offer to do equity and defendant has not in fact made any offer to do equity which has any legal or equitable or moral persuasiveness.

XXI.

Defendant's conduct in refusing to pay compensation to plaintiff on and after May 26, 1943 in accordance with the terms of said contract was calculated, arbitrary and unwarranted and was not [366] the result of mistake, unavoidable accident, fraud, surprise, or ignorance, and was not predicated upon any of the alleged representations of plaintiff as set forth in defendant's answer as amended or as separate and distinct defenses in its answer and amendments thereto, or adduced in the form of evidence at the time of trial.

XXII.

Plaintiff is entitled to a termination of said contract as of May 29, 1943.

XXIII.

Plaintiff is entitled to a judgment for compensation earned by plaintiff under said contract for the period from May 20, 1943 to May 29, 1943, both dates inclusive, at the rate provided for in said contract, to wit: \$2,250.00.

XXIV.

Plaintiff is entitled to his costs of suit.

Let Judgment Be Entered Accordingly.

Dated, Los Angeles, California, August 24, 1944.

H. A. Hollzer
Judge

[Endorsed]: Filed Aug. 24, 1944. [367]

In the District Court of the United States
Southern District of California
Central Division

No. 3242-H

ROBERT CUMMINGS,

Plaintiff.

vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Defendant.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Cross-Complainant,

vs.

ROBERT CUMMINGS,

Cross-Defendant.

JUDGMENT

Heretofore and on January 4, 1944, the above entitled action came on regularly for trial before the Honorable Harry A. Hollzer in the above entitled court, sitting without a jury, plaintiff being present in person and by his counsel, Roth & Brannen by Lester Wm. Roth and Joseph J. Cummins, and defendant being present by its counsel, Loeb & Loeb by Grant Cooper, and it having been stipulated at the outset of the trial by the parties through

their respective counsel that the primary issues for decision were comprised within the first and second causes of action of plaintiff's complaint and the answer of defendant as [368] amended and that if the court should decide said causes of action in favor of plaintiff that it would be unnecessary to try the fourth cause of action, and the third cause of action having been dismissed by plaintiff, and it further having been stipulated by the parties through their respective counsel that the motion for summary judgment heretofore made by plaintiff and the motion for injunction pendente lite heretofore made by defendant need not be argued or presented, and counsel for defendant having stated in open court that the motion for injunction pendente lite was moot and plaintiff having stated that the motion for summary judgment would of necessity be decided by the trial of said first and second causes of action, and it having been thereupon decided by said court that said motions and each of them go off calendar and said trial having been heard from day to day on January 4, 5, 6, 7, 10 and 11th and evidence both oral and documentary having been submitted on behalf of each of said parties and the matter having been fully argued by counsel for the respective parties, orally and in briefs, and having thereupon been submitted to the court for its decision and said court now being fully advised in the premises, and the Court having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged, Decreed and Declared:

(1) The written contract between plaintiff and defendant dated November 21, 1938, as amended, is declared terminated as of the expiration of the working day of May 29, 1943, and said contract as amended is declared as of said date to be cancelled and of no force and effect and not binding upon either plaintiff or defendant after May 29, 1943. [369]

(2) Plaintiff have judgment against defendant for the sum of \$2,250.00, and his costs of suit incurred herein, in the amount of \$70.45.

Dated, Los Angeles, California, August 24, 1944.

H. A. Hollzer
Judge

Judgment entered Aug. 24, 1944. Docketed Aug. 24, 1944. C. O. Book 27, page 446. Edmund L. Smith, Clerk, by L. Wayne Thomas, Deputy Clerk.

[Endorsed]: Filed Aug. 24, 1944. [370]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL.

Defendant and cross-complainant (herein sometimes referred to as "defendant") moves the Court to set aside the Findings of Fact and Conclusions of Law and Judgment made and entered in the above entitled cause on the 24th day of August, 1944, and to grant defendant a new trial on the grounds:

1. That the judgment is contrary to law, in this:

(a) At the time of bringing said action, for [371] a long time prior thereto, and at all times since, plaintiff and cross-defendant (sometimes herein referred to as "plaintiff") was in default under the terms of the contract alleged in plaintiff's complaint, and had repudiated said contract, and had not retracted such repudiation; and

(b) Defendant had not committed any breach, or any material breach, of said contract.

2. The evidence is insufficient to justify the decision, in this:

(a) There is no substantial evidence to justify the termination or rescission of the contract alleged in plaintiff's complaint.

(b) The evidence shows, without conflict, (1) that at the time of bringing said action, for a long time prior thereto, and at all times since, plaintiff was in default under the terms of the contract alleged in plaintiff's complaint, and had repudiated said contract, and had not retracted such repudiation; and (2) that defendant had not committed any breach, or any material breach, of said contract.

(c) There is no substantial evidence to show that any of the alleged breaches of said contract on the part of defendant were, or are, material breaches.

(d) There is no substantial evidence to show that defendant breached, or threatened to breach, any of the conditions of said contract to be performed by defendant.

(e) There is no substantial evidence to show that plaintiff had performed, or had offered to perform, the duties and obligations on his part to be performed under said contract. [372]

(f) There is no substantial evidence to show that defendant waived any of its rights under said contract.

This motion is made upon the pleadings, records, files, proceedings, evidence, and reporter's transcript of the testimony in the above entitled cause.

Wherefore, defendant prays that an order may be entered in said cause setting aside the Findings of Fact and Conclusions of Law and the Judgment made and entered in said cause, and that a new trial of the issues in said cause may be had, and for such further, and different relief as may be proper.

Dated September 1, 1944.

JOSEPH L. LEWINSON
LOEB & LOEB

By Joseph L. Lewinson

[Endorsed]: Filed Sep. 1, 1944. [373]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS,

Judge Hollzer's Calendar,

October 30, 1944

Defendant has moved for a new trial. In its Memorandum of Points and Authorities filed in support of said motion, defendant's counsel have stressed three points. In a prefatory statement in said memorandum, counsel assert "we shall ask the Court particularly to consider these questions:—

"Was plaintiff, who without color of right and under aggravating circumstances breached his contractual duty to play the role of 'Hank' in 'Fired Wife,' entitled to receive \$250.00 a day after the completion of that production and until he might properly be directed to play a similar role in [398] a like production, in order that he might have an opportunity again to breach his contract; and was he entitled to carry on such a course of conduct for a period of five years, to the end that he might do no work but nevertheless collect \$250.00 a day during intervals between pictures? Is an affirmative answer to this question required, even though at the time of plaintiff's breach he announced that he would again breach his contract if he were properly required by defendant in the future, pursuant to the contract, to perform a role in a picture similar to 'Fired Wife,' or any other role in any other picture, under a director of defendant's choice? After breaching and renouncing this contract, was plaintiff entitled to rescind it even though defendant failed to

make compensation available to plaintiff, although plaintiff had not recanted or notified defendant he would perform in the future."

The three main points presented in defendant's memorandum are the following:

Firstly, counsel contend, "Having himself breached the contract, plaintiff is not entitled to rescind, even though defendant might have committed subsequent breaches."

Secondly, it is claimed, "Plaintiff is not entitled to rescind, because he repudiated the contract by refusing to work for the duration and also by refusing to work except on conditions not in the contract." [399]

Lastly, it is urged, "Assuming defendant were in default, plaintiff still would not be entitled to rescind the contract."

If the questions and the contentions above quoted were justified by and were relevant to the facts of this case, as established by the record, we would not hesitate to analyze and discuss the same at length. However, as we appraise the record and the inferences which fairly may be drawn therefrom, the facts out of which the action at bar has arisen differ materially from those included among the basic assumptions upon which the above quoted questions and contentions necessarily rest.

For example, the Court made no finding—nor do we believe such finding ought to have been rendered—to the effect that plaintiff refused "to play the role of 'Hank' in 'Fired Wife'," so as to be "entitled to receive \$250.00 a day after the completion of that production and until he might properly be directed to play a similar role in a like production, in order that he might have an opportunity again to breach his contract."

Again, no finding was made—and we are satisfied that no finding ought to have been reached—to the effect that plaintiff threatened or intended “to carry on such a course of conduct for a period of five years, to the end that he might do no work but nevertheless collect \$250.00 a day during intervals between pictures.”

Likewise, no finding was made—and we believe that no finding ought to have been made—to the effect that plaintiff “announced that he would again breach his contract if he were properly required by defendant in the future, pursuant to the contract, to perform a role in a picture similar to ‘Fired Wife,’ or any other role in any other [400] picture, under a director of defendant’s choice.”

Furthermore, no finding was made—and we are persuaded that no finding ought to have been entered—to the effect that prior to defendant’s default arising from the fact that “defendant failed to make compensation available to plaintiff.” (Defendant’s default amounted to more than a mere failure; it was an intentional refusal to pay the compensation due to plaintiff), the latter had given notice “renouncing this contract,” or that at any time he had performed or omitted any act, as a consequence of which he should have “notified defendant he would perform in the future.”

In a rather comprehensive memorandum of conclusions filed subsequent to the submission of this cause, we endeavored to set forth the salient features of the record, including admissions made at various stages of the proceeding. A reading of said memorandum should make it clear that we disagree with defendant’s conception of the facts in important particulars therein pointed out.

In support of defendant's contentions counsel have cited decisions arising out of facts differing materially from those which we have found have been established in the instant suit. In none of the cases cited did the contract construed therein contain provisions analogous to those comprising the essential terms of paragraph twelve of the contract involved herein. Nor did the facts in any of said actions disclose that the parties had pursued a course of conduct applying and construing the agreement similar to the course which the litigants here had followed.

In the aforementioned memorandum of conclusions we pointed out that according to the evidence which we regard as credible the only obligation which plaintiff refused to [401] perform was to portray the role of "Hank" in the photoplay "Fired Wife." The provisions of said paragraph twelve, so far as pertinent here, specified that in the event of plaintiff's refusal to perform any of his obligations, defendant had the right to terminate said contract, or, at its option, refuse to pay plaintiff any compensation during the period of such refusal and to extend the term of said agreement and all of its provisions for a period equivalent to all of the period during which such refusal continued, provided that if at the time of such refusal plaintiff had been cast to portray a role in a photoplay and should another person be engaged to portray such role, then defendant had the right to refuse to pay plaintiff any compensation until the completion of such role by such other person.

Furthermore, as pointed out in said memorandum of conclusions, plaintiff's dispute with defendant's representative arose primarily out of the latter's repudiation of certain verbal promises and representations he had made to the former respecting the director and the cast to be selected for the production of the photoplay "Fired Wife," in which plaintiff had been scheduled to portray the leading male role. When he contended that defendant's agent should live up to said promises and representations and when plaintiff's agent urged that the dispute could be adjusted by the defendant assigning an outstanding director to direct the production of said photoplay, the latter insisted, so to speak, upon holding plaintiff to the strict letter of his bond. Under the contract, defendant could take the strict legal position that plaintiff was obligated to "perform and render his services * * * * * conscientiously and to the full limit of his ability," and also that while it was a perfectly natural and indeed laudable ambition on his part to seek to portray [402] leading roles in photoplays directed by an outstanding director and in which other principal parts would be portrayed by outstanding artists in the motion picture industry, nevertheless, said agreement was silent respecting any obligation on defendant's part relative to any promises or representations of the character aforementioned. In other words, when plaintiff insisted that defendant fulfill the promises made by its agent, the latter, in effect, replied after the manner of a famous character in Shakespeare's "Merchant of Venice"—"I cannot find it; 'tis not so in the bond."

In the final analysis, as we construe the record before us, by his efforts to compel defendant's representative to comply with said promises and representations, plaintiff was doing his utmost in good faith to insure the successful production of the photoplay "Fired Wife." While, no doubt, such success would have enhanced his prestige as an actor, it is equally clear that the same might well have redounded to the defendant's benefit, financially and otherwise. Under such circumstances, we cannot construe plaintiff's conduct as an attempt to injure defendant or to terminate said contract or to breach any of his obligations thereunder, much less as constituting bad faith.

Again, as stated in said memorandum of conclusions, under the facts as the Court has found them to be—and as we believe virtually conceded by defense counsel during one of the oral arguments—plaintiff's refusal to portray the role of "Hank" did not accord to his employer both "the right to extend the term of this agreement and all of its provisions" and, in addition, the further right to refuse to pay any compensation to him during the period ensuing upon the completion of said role by the person engaged to portray the same. [403]

To plaintiff, as we pointed out in said memorandum of conclusions, defendant's obligation to pay him compensation was the most important provision of this agreement. Defendant's refusal to pay the same was deliberate and intentional. In adopting that course defendant acted at its peril. By such refusal and default on its part, defendant gave to plaintiff the correlative right to terminate

said contract. He availed himself of that right and notified defendant to that effect.

Finally, we desire to add that in our view of the record defendant's attack upon plaintiff's good faith and upon his patriotism is clearly without merit. With respect to his good faith, the comments heretofore made should suffice. As to plaintiff's patriotism, the evidence abundantly established—indeed, there was not a scintilla of proof to the contrary—that long before the controversy in suit arose plaintiff had become an experienced, competent airplane pilot; that he had volunteered for enlistment as a pilot in the Armed Forces of our country, but had been rejected solely because of his age, and that having been barred from the latter service he was doing his next best by serving as a member of the Civil Air Patrol, more particularly by instructing others how to pilot an airplane. In addition, he had volunteered to serve overseas as an actor in the presentation of the programs conducted under the auspices of U. S. O. Camp Shows, but had been prohibited from so doing through no fault of his own.

Upon the record, therefore, as we understand it, we see no escape from the conclusions announced in the findings and judgment heretofore rendered. Accordingly, we hold that defendant's motion for a new trial should be denied.

Copies to counsel.

[Endorsed]: Filed Oct. 30, 1944. [404]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 30th day of October in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.

No. 3242-H

Robert Cummings,

Plaintiff,

vs.

Universal Pictures Co., Inc., a corporation,

Defendant.

Universal Pictures Co., a corp.,

Cross-Complainant,

vs.

Robert Cummings,

Cross-Defendant.

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that defendant's motion for a new trial be, and the same is, denied. [405]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that Universal Pictures Company, Inc., a Corporation, defendant and cross-complainant in the above entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment [406] entered in this Court on August 24, 1944.

Dated November 15th, 1944.

LOEB & LOEB

JOSEPH L. LEWINSON

By Joseph L. Lewinson

Attorneys for said Defendant and Cross-Complainant.

Names and Addresses of Attorneys:

Roth and Brannan, 621 South Hope Street, Los Angeles 14, California. Joseph J. Cummins, 739 South Hope Street, Los Angeles 14, California, Attorneys for Plaintiff and Cross-Defendant.

Loeb & Loeb, 523 West Sixth Street, Los Angeles 14, California. Joseph L. Lewinson, 621 South Hope Street, Los Angeles 14, California, Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed & mailed copy to Roth & Brannan, and Joseph J. Cummins, attorneys for plaintiff, Nov. 15, 1944. [407]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND.

Know All Men By These Presents, that we, Universal Pictures Company, Inc., a Corporation, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Robert Cummings in the full and just sum of Two Thousand Seven Hundred Fifty Dollars (\$2,750.00), to be paid to the said Robert [408] Cummings, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 13th day of November, 1944.

Whereas, on August 24, 1944, a judgment was rendered in the above entitled Court in favor of said Robert Cummings and against said Universal Pictures Company, Inc., a Corporation, and the said Universal Pictures Company, Inc., a Corporation, has appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such that if the said Universal Pictures Company, Inc., a Corporation, shall prosecute said appeal with effect, and satisfy the said judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs.

interest, and damages as the appellate court may adjudge and award, then the above obligation to be void, otherwise to remain in full force and virtue.

UNIVERSAL PICTURES COMPANY, INC.

By H. T. Brewster

Assistant Treasurer

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND

By W. M. Walker

W. M. Walker,

Attorney in Fact. (Seal)

Attest Theresa Fitzgibbons

Theresa Fitzgibbons,

Agent.

State of California

County of Los Angeles—ss:

On this 13th day of November, 1944, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. M. Walker, known to me to be the Attorney-in-Fact, and Theresa Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity

and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

(Seal)

S. M. SMITH

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires February 18, 1946.

The foregoing bond is hereby approved, and is to stand as a supersedeas until the final determination of the appeal.

Dated November 15, 1944.

BEN HARRISON

United States District Judge.

Examined and recommended for approval as provided in Rule 8.

LOEB & LOEB

JOSEPH L. LEWINSON

By Donald Armstrong

Attorneys for Defendant and Cross-Complainant.

[Endorsed]: Filed Nov. 15, 1944. [409]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 421 inclusive contain full, true and correct copies of Complaint for Declaratory and Other Relief; Answer; Order for Removal to Federal Court and Stay of Proceedings; Certificate of Clerk of Superior Court; Order to Show Cause; Cross-Complainant's Memorandum of Points and Authorities on Application for Temporary Injunction; Counterclaim; Affidavit of Robert Speers; Letter dated October 29, 1943 to Clerk from Roth and Brannan; Answer to Counterclaim; Notice of Motion for Summary Judgment; Affidavit of Robert Cummings re Preliminary Injunction; Affidavit of Oscar R. Cummins; Affidavits of B. W. Steinberg, Daniel J. Kelley, Herman D. Cook, H. S. Brewster and Ivan Betts on Application for Injunction and Against Motion for Judgment; Affidavit of Edward Muhl; Supplementary Affidavit of Oscar R. Cummins in Support of Motion for Judgment and Against Application for Injunction; Affidavit of Bella Marco in Support of Motion for Judgment and Against Application for Injunction; Affidavit of James A. Smith in Support of Motion for Judgment and Against Application for Injunction; Affidavit of Oscar R. Cummins in Response to Affidavit of Edward Muhl; Points and Authorities in Opposition to Motion for Permission to File Amendment to Answer; Amendment to

Answer; Stipulation of Facts; Memorandum of Conclusions dated December 31, 1943; Proposed Second Amendment to Answer; Plaintiff's Trial Memorandum of Points and Authorities and its Objections to the Proposed Second Amendment to Defendant's Answer; Appendix to Plaintiff's Trial Memorandum of Points and Authorities; Supplemental Trial Brief; Answer to Plaintiff's Supplemental Trial Brief; Plaintiff's Exhibits 1 to 3 inclusive; Defendant's Exhibits A to E inclusive; Memorandum of Conclusions dated March 6, 1944; Minute Order Entered March 6, 1944; Objections and Amendments to Proposed Findings and Judgment; Answer to Objections and Amendments to Plaintiff's Proposed Findings and Judgment; Notice of Motion for Order of Dismissal and Judgment on the Pleadings; Plaintiff's Points and Authorities in Opposition to Motions to Dismiss and for Judgment on the Pleadings; Memorandum of Conclusions dated August 21, 1944; Minute Order Entered August 21, 1944; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for New Trial; Memorandum in Support of Motion for New Trial; Memorandum of Conclusions dated October 30, 1944; Minute Order Entered October 30, 1944; Notice of Appeal; Supersedeas and Cost Bond; Defendant's Statement of Points on Appeal; Defendant's Designation of Contents of Record on Appeal; Plaintiff's Designation of Additional Contents of Record on Appeal which, together with Original Reporter's Transcripts transmitted

herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$58.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19 day of December, 1944.

[Seal]

EDMUND L. SMITH,
Clerk.

By Theodore Hocke,
Chief Deputy Clerk.

No. 10954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Appellant,

vs.

ROBERT CUMMINGS,

Appellee.

VOLUME II.

(Pages 273 to 712, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAR 15 1945

PAUL P. O'BRIEN,
CLERK

No. 10954

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United States Circuit Court of Appeals

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TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

[Title of District Court and Cause.]

Hon. Harry A. Hollzer, Judge Presiding

REPORTER'S TRANSCRIPT

Of Hearing on Order to Show Cause Why Injunction
Pendente Lite Should Not Issue and Hearing on
Motion for Summary Judgment.

Appearances:

Joseph J. Cummins, Esq., and
Roth & Brannen, by
Lester Roth, Esq.,
For Plaintiff.

Loeb & Loeb, by
Norman Newmark, Esq.,
For Defendant.

Los Angeles, California, Friday, November 5, 1943;
10 A. M.

The Court: The clerk has called my attention to the fact that counsel are suggesting that a reporter would not be necessary. I wonder if we might review the situation and determine, after further reflection, whether we should have a reporter. To some extent I have been studying these files and would like to, at least in discussion with counsel, clarify my own thinking. For that reason it may be both helpful and necessary that a reporter take down any stipulations that may be made, or counsel might like the benefit, at least, of some views which I might express.

Mr. Roth: We are both agreeable to having a reporter. As a matter of fact, Mr. Newmark suggested to the reporter that he didn't feel, as far as we were concerned, that we needed one, but the court might feel a reporter was desirable.

Mr. Newmark: That is quite satisfactory.

Mr. Roth: I think we are both agreeable to having a reporter.

The Court: Very well. Of course, I haven't examined the affidavits that have just been filed, but from such reading as I have been able to do with reference to the record I have gathered certain impressions which I would like to speak of at this time, and it may be that counsel would like to comment thereon.

At present we have a complaint comprising several counts, [2*] and with reference to Count I plaintiff is seeking, in effect, declaratory relief and has moved for summary judgment as to that count. The defendant has applied for an injunction *pendente lite*, and various affidavits have been submitted pro and con, respecting both the motion for summary judgment and also the application for an injunction *pendente lite*. The basis for the action would seem to be that the plaintiff contends, by virtue of the facts brought out in the complaint and the answer, and also somewhat amplified by the affidavits, that along sometime in May of this year he became entitled to compensation under the contract that had been entered into between the parties sometime in 1938; that even assuming that the defendant was entitled to the relief from paying him any compensation during the period required for the making of a certain picture, in the playing of which the

*Page number appearing at top of Reporter's Transcript.

plaintiff had refused to participate, and even assuming that the defendant was entitled to declare the contract suspended for the period referred to, that from and after the determination of such period the plaintiff was entitled to his compensation as stipulated in the contract; that the defendant having taken the position that he was not entitled to be paid for this subsequent period, and having refused to pay any compensation for this later period, the defendant has breached the contract and, therefore, the plaintiff is entitled to the benefit of the termination thereof, notice of which he has given. [3]

Perhaps I should pause there and ask plaintiff's counsel whether, up to this point, I have correctly appraised your position?

Mr. Roth: I will say that your Honor has stated it very admirably and in a refreshing way.

The Court: Now, the defense here asserts, firstly, that no demand was made on behalf of plaintiff for compensation through the appropriate channel, but further—and this would seem to be the crux of the defense—that the terms of the contract entitle the defendant to continue the suspension beyond the period previously mentioned and to continue that suspension at least until the plaintiff shall affirmatively in some manner inform it that he is prepared to resume work under the contract.

Up to this point have I correctly appraised the position of the defense?

Mr. Newmark: Yes, your Honor. There may be additional defenses in so far as the claim of breach of contract is concerned. In other words, these are our basic points that your Honor has stated, but even if it were to be held that these points were not well taken, we would still maintain that there has been no material breach of

contract or that the plaintiff is in no position to make that assertion. In other words, even if it should be assumed that these points were not well taken, it would not follow that there had been a breach of the character which would entitle the plaintiff [4] to terminate the contract. But that is an alternative argument, and your Honor has stated correctly our main point.

The Court: Turning now to what may be characterized as the basic element in the defense, and in order to clarify at least my own thinking, I should like—

Mr. Roth: May I interrupt the court for a moment?

The Court: Yes.

Mr. Roth: We have prepared typewritten copies of the contract which is Exhibit A to the complaint, because I found it very difficult reading the printed copies myself, and I thought perhaps the court might want to use a typewritten copy rather than the printed copy. We have one for counsel for the defense, too. And if the court desires it—

The Court: Very well. I will avail myself of that. Now, there are some questions that I would like to have considered, and preliminary thereto I should like to quote certain passages of the contract. I call attention first to paragraph 2, and I shall skip certain passages therein, for the purpose of emphasizing the particular language that gives rise to such questions, at least in my own mind.

“The artist agrees that throughout the term hereof he will render the services hereinafter specified, solely and exclusively for and as requested by the producer; that he will render his services as an actor in such roles and in such photoplays and/or other productions as the producer may designate;” [5]

Now, I am skipping several lines down in the same paragraph 2. Resuming the quotation:

“The artist further agrees that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection with the services to be performed by the artist hereunder; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer.”

That is the end of the excerpt quoted from paragraph 2. Turning now to paragraph 18:

“The services of the artist hereunder are to be rendered at such place or places as may from time to time be designated by the producer.”

That is the end of the quotation in that paragraph.

Turning now to paragraph 19:

“The artist expressly agrees that until the expiration of the term hereof he will be available at all times in Los Angeles, California, or at any other place the producer may designate, unless excused in writing by the producer. The artist further agrees that if and when requested by the producer to do so, he will report at the producer’s studio, or at any other place the producer may designate, for wardrobe fittings, publicity interviews,” etcetera.

Let us turn now to the complaint. [6]

I, of course, is the proforma recital of the defendant’s corporate existence.

Paragraph II includes the following, as the next to the last sentence:

"The present controversy arises by reason of the fact that defendant contends that said contract still exists between the parties and plaintiff contends that it was terminated on May 29, 1943."

I notice that the answer purports to deny that, and I am wondering if that was really intended to be denied.

Mr. Loeb: Well, I didn't prepare the answer, your Honor. I don't know what was in Mr. Schwartz's mind at that time, unless possibly the purpose of the denial was to probably give point to our contention that no real substantial controversy does actually exist in this case; that there is no real bona fide controversy as to this. That is the only thing I have in mind. I wouldn't like to say for the record now, your Honor, something at variance with what is contained in the answer, because Mr. Schwartz may have something in mind that hasn't appeared to me. It is perfectly apparent that the first cause of action is predicated upon the assumption that there is a controversy set forth there. I am afraid that is as far as I can go.

The Court: You say there is no such dispute between the parties, the plaintiff, on the one hand, contending that the contract was terminated by him on May 29th, and the defendant [7] contends that it wasn't terminated, but still is in existence?

Mr. Newmark: No; I don't say that, your Honor; obviously there is a dispute, as evidenced by the various letters and communications that have passed. I didn't make myself clear. The only thing I can ascribe to the drafter of this answer, in denying that particular portion

of paragraph II, would be that possibly he had in mind that by admitting that a controversy existed he would be admitting that there was a bona fide controversy; that is, by "bona fide controversy" I mean that facts exist which give real color to the plaintiff's claim. And it may be that that is what he had in mind. I don't know, frankly, your Honor. My own view is that we certainly ought to have this matter determined. I myself see no harm in admitting that there is a controversy as alleged in there, and it doesn't seem to me that the admission of that fact would in any way admit that the plaintiff has any real ground for raising that point.

The Court: I think there is a distinction there.

Mr. Newmark: I do, too; and so long as that is plain I would have no objection to agreeing that it could be considered, for the purpose of this hearing, certainly, that there is a controversy there, without in any way thereby admitting that the plaintiff's contention is either well taken or is colorfully well taken.

The Court: I think it is satisfactory to say that an issue is raised with reference to what is recited in the [8] concluding sentence of paragraph II, namely, "Said controversy arises out of the facts hereinafter alleged." Of course, the defendant contends that the facts are different. So obviously there is place for a denial there, but it seems to me the balance of paragraph II is really not in dispute.

Paragraph III apparently is not in controversy, and paragraph IV apparently is not in controversy.

Mr. Newmark: I think there is just the difference of the date, your Honor; May 18th and May 19th.

Mr. Roth: That is all.

Mr. Newmark: That is all. I don't think there is any materiality as to that, though.

The Court: Are you agreed that the role of "Hank" in the picture entitled "Fired Wife" was completed May 19th, rather than May 18th?

Mr. Roth: Yes. They say the 19th. We say the 18th. It doesn't make any difference. We accept the 19th.

The Court: As to paragraph V, apparently it is admitted that the defendant served on plaintiff the notice which is set out in *haec verba* there. The only issue apparently that has been raised is as to the plaintiff's interpretation of the meaning or effect of that notice.

Mr. Newmark: I think that is correct.

The Court: Turning to paragraph VI, the last sentence reads:

"No demand, oral or written, was made by defendant at any [9] time after April 10, 1943, that plaintiff report to defendant in connection with any other picture or for any services pursuant to said contract."

The answer denies that allegation. Such study as I have been able to make of the affidavits prompts this question: It appears that the practice followed by the parties; in other words, the construction by the parties themselves given to the contract was at least in part as follows: From time to time the defendant produced pictures, in certain of which it required the plaintiff to portray a particular role. So far as is disclosed by the record the plaintiff was not accustomed to sitting around the studio day after day, but merely attending at the studio, or wherever the picture happened to be produced, on such days as the producer or those working under him required his presence, and the plaintiff received compensation during periods when he wasn't actually engaged in

portraying a role or when he wasn't actually present on the studio lot or on location. Sometime in March of this year the defendant apprised plaintiff that a picture entitled "Fired Wife" was about to be produced and that he would be expected to portray the particular role therein. I am not sure whether the record makes it clear, but we may assume, I think, for the purpose of the present discussion, that the plaintiff was properly notified to report at the studio to begin portraying the role of "Hank" in that picture; that he failed to do so; that the defendant [10] went ahead with the production, substituting another artist in his place. I am a little bit ahead, and I shall go back to April 15, 1943, on which date the defendant served a notice upon plaintiff advising him, in substance, that by reason of his refusal to report on April 12, 1943, the studio had elected to exercise certain rights granted to it under paragraph 12 of the contract, and in this notice they stated, among other matters, and I am reading now the last sentence of the next to the last paragraph which is found in the complaint, page 3, beginning with the last three words of line 11:

"We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person."

I call particular attention to the expression, "refuse to pay you any compensation until the completion of such role by such other person."

Returning now to paragraph V and the notice dated May 18, 1943, which on that day was served by defendant on plaintiff; that was the notice which called attention

to the fact that the defendant had suspended the plaintiff by reason of his refusal to portray this role in the picture "Fired Wife," and it further advised plaintiff that the defendant had elected to extend the term of his unemployment for the period [11] of the suspension, and added this language, which is set forth in the next to the last paragraph of that notice:

"Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, refusal and/or neglect to perform your obligations thereunder, and we reserve the right to extend your employment under said contract, as amended, for an equivalent period."

Now, I am suggesting at this place that plaintiff's counsel keep in mind that it is not clear to me just what is the theory of the defense with reference to that particular portion of the notice and what legal effect the contention there asserted has upon the rights of the parties.

Now, have I already averred to the concluding sentence of paragraph VI of the complaint?

Mr. Roth: Yes, your Honor. You stated, in respect to that concluding sentence, that that was denied by the answer.

The Court: Yes.

Mr. Roth: In that respect might I call your attention, although I am certain that it hasn't been overlooked, to paragraph X, page 9 of the complaint. By paragraph X, which is in effect an admission, it actually has the effect of admitting the concluding sentence of paragraph VI.

The Court: I have a notation here that paragraph X has not been denied.

Mr. Roth: Yes. [12]

The Court: And I was about to observe that it is a matter with reference to which I would like to have the defense comment, because it is not clear to me as to the basis upon which the defendant contends that there was any further refusal or failure on the part of the plaintiff to do that which, under the contract, he was required to do.

At the outset of this discussion I quoted from certain passages of the contract which, I confess, represents only a limited study, but which, in my present thinking, would seem to indicate that if the defendant desired plaintiff to portray some new role or to do any of the other matters specified in the portions of the complaint previously quoted, that the practice of the parties was such that the plaintiff was entitled to await some new or further call on the part of his employer.

Turning now to paragraph VII, the first sentence is apparently denied; also, that portion of the concluding sentence wherein the plaintiff has undertaken to, perhaps, state a legal conclusion in characterizing the defendant's failure to pay any further compensation—

Mr. Newmark: May I interrupt a moment, your Honor?

The Court: Yes.

Mr. Newmark: I found an error in the answer here to which I called counsel's attention before appearing and said I would like to amend at this time. On page 3, line 2—

The Court: Of the answer? [13]

Mr. Newmark: Of the answer, where it repeats the words of the complaint, "failed and refused to pay," and in line 3, "has failed and refused." The words "and refused" should not have been included in either case, and we ask now that that be stricken, as an amendment.

Mr. Roth: Mr. Newmark advised me of that just prior to the hearing this morning, and I told him I was not going to oppose the request for any amendment that is apparently based, as it is, upon an inadvertence of the drafter. That is my position now.

The Court: Very well. The clerk may note such amendments. In other words, you are striking out the words "and refused" in line 2 and again in line 3?

Mr. Newmark: Yes, sir.

The Court: On page 3 of the answer?

Mr. Newmark: Yes, your Honor.

The Court: At this stage perhaps counsel can help clear up this matter of what practice was followed by the parties with reference to the physical steps of picking up a check representing compensation, where it was obtained, the manner in which that feature of the performance of the contract was actually carried out. Now, I gather from the affidavits that defendant had an office where its employees, or at least the artists, such as this plaintiff, would go on stated occasions or could send someone to obtain the check which represented the compensation paid to him under the contract, [14] and that the practice was a rather simple one; he didn't have to wait on the president or the chief executive of the company, but obviously in large business enterprises, as undoubtedly this defendant's business is, that there is orderly and systematic procedure followed and that one would come to some office or counter where he would ask for his check and it would be handed to him, perhaps by some subordinate holding no particular title in the accounting office, the cashier's office, or some such department; those checks would be made out in advance of the time when the employees normally would be paid; that those in charge of the defendant's

financial records would follow a particular routine and the checks, perhaps hundreds of them, would be signed and be there awaiting the arrival of the employees.

Now, are we to understand that the affidavits indicate anything different as to the practice which was followed?

Mr. Newmark: No. I think that is substantially correct, your Honor, except this: That the practice which would be followed in the case of a man who is regularly working for the studio, namely, of having the checks ready where his agent picks them up, is not at all the practice or the procedure which we would expect to have followed or as to which there may be any precedent where a man is on suspension and has been notified that the suspension is going to continue until he comes back to work. In other words, your Honor has outlined the practice, and when I state that that is [15] substantially the way I understand it, I do not wish to be understood to say that that is the practice that is followed where a man is suspended and he is not going to be paid until he comes back to work. We certainly do not concede in this situation that there is any practice, where they send a person or an agent for the man's check and say, "Is the check ready?" And they say, "No; the man is on suspension," then take the position that the plaintiff is ready, willing and able to go back to work. In other words, I don't profess to know what the practice would be in a case of that kind, or whether there have been any other cases that have arisen in this way; I don't know; but I should suppose that—and this probably is a matter that isn't to be considered on the record—but I should suppose that the matter of suspension of an artist of some importance is not something that just occurs in five minutes. It is probably preceded and succeeded by various talks

with the artist, with the agent, and so on and so forth. And I should also assume, although here again I am not purporting to state facts, because I don't know what the facts are, but I have a little familiarity with the way the industry works—I should also assume that where an artist has been suspended and has been notified that he is not going to be put back on the payroll until he is ready to come back to work, that there would be, in the normal course of events, some contract between the officials of the company on the one hand, and the artist or [16] his representative on the other, relative to a change in that situation. And I don't think that the practice of picking up checks, where there is a continuity of employment, has any bearing on the particular factual situation we have here.

Mr. Roth: May I correct Mr. Newmark in one statement he has made and repeated, and which I think he is assuming is a fact in this case? That is the statement that that would not be the practice where a man has been notified that he wouldn't be paid until he reported back to work. I have studied the notices assiduously, not only the two notices that we plead in *haec verba* in our complaint, to-wit, April 15th and May 18th, but also those notices which are made a part of the affidavit of Robert Cummings and which include all communications which took place between the parties from May 29th to and including the date that the complaint was filed; and in only one of them, the notice of June 2nd, which is set forth in *haec verba* in the complaint, is there any statement by the defendant that the plaintiff wouldn't be paid until he came back to work. In the notice of June 2nd, which is in the complaint, there is a statement, "If you are willing to report back to work," or words to that effect, "you can do

so''; but in no other notice is there such a statement. And, of course, that notice of June 2nd was not sent until after the notice sent by the plaintiff on May 29th, which terminated the contract; and there is nothing in the [17] notice of April 15th and there is nothing in the notice of May 18th which says he is going to be on suspension until he comes back to work.

One other thing: We don't have the affidavit here, but it can be procured very easily. Robert Cummings had been on suspension before. Other actors and actresses of Universal have been on suspension before; one that has been reported to me and that I know of, Deanna Durbin. Her suspension was for a definite period of time, as is the case here; and in each case the actor or actress automatically was put back on the payroll upon the termination of the period of suspension specified in the notice. That is all I care to add to what has been said.

Mr. Newmark: I think that the difference between us as to that, Mr. Roth, is a matter of interpretation of these documents.

Mr. Roth: That may be true, Mr. Newmark, but I claim this, and I think with some foundation, because the interpretation has been placed upon them by the defendant itself in its notices. The defendant elected to send these notices. It sent the notice of April 15th, it sent the notice of May 18th, and the defendant sent the notice of June 2nd, as well as subsequent notices. In just one of them did it elect to make its position clear that it wouldn't pay until the artist reported back, and that one is the notice of June 2nd.

Mr. Newmark: I will be glad to reply to that, your Honor, [18] but I think we are getting into the matter—

The Court: I have brought up this matter merely to

indicate that the record, as I see it, is not clear as to what is the position of the defense with reference to the basis for its position that some affirmative action was required on the part of the plaintiff before he would be entitled to the resumption of compensation.

Mr. Newmark: I will be glad to reply to that, your Honor. I would say, first, that in so far as the motion for summary judgment is concerned there is, of course, the definite issue as to whether any demand was ever made on the defendant, either through this pay window or otherwise. The affidavits make a clear issue of fact on that subject. The plaintiff's affidavits say that the demand was made, and the defendant's affidavits say no such demand was made. So as far as the position of the defendant, under the affidavits and the pleading, is concerned, it stands that they are denied and that the defendant at all times understood that the plaintiff was not going to work. But passing that for a moment and going to the contract. Paragraph 12 of the contract gives the studio the right—I had better refer to the type-written part, if your Honor is referring to that.

Mr. Roth: Paragraph 12 commences on page 9, Mr. Newmark.

Mr. Newmark: Yes. Page 9, line 20: "In the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit [19] of his ability or as instructed,"—and, of course, the pleadings show that he refused to carry out the particular role—"the producer, at its option, shall have the right to cancel and terminate this employment, may refuse to pay the artist any compensation during the period of such failure, refusal or neglect on the part of the artist, and shall likewise have the right to extend the term of

this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues."

That is one right. Then continuing: "If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, or shall have been directed to render any other of his required services hereunder, then and in either of said events the producer shall have the right to refuse to pay the artist any compensation during the time which would have been reasonably required to complete the portrayal of said role and/or to render such other services, or (should another person be engaged to portray such role or to render such other services) until the completion of such role or such other services by such other person; and in any or either of such events the producer shall also have the right to extend the term of this agreement and all of its provisions for a like period of time or for any portion thereof."

Now, a little later down, in line 29, page 10: "[20] period during which the producer is entitled to refuse to pay compensation to the artist pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the artist shall be requested by the producer to and shall render other services hereunder."

Referring for a moment to the notice which is set out in the complaint. The first paragraph, as I read this notice—

The Court: Which notice are you speaking of?

Mr. Newmark: Page 2, paragraph III of the complaint, the notice of April 15.

"This is to notify you that by reason of your failure, refusal or neglect to perform your obligations under your

contract of employment with us dated November 21, 1938, as heretofore amended, and particularly by reason of your failure, refusal or neglect to report to us on April 12, 1943, in accordance with our notice to you dated April 10, 1943, we elect to and do hereby exercise the right granted us under the provisions of paragraph 12 of said contract to refuse to pay you any compensation during the period of such failure, refusal or neglect."

That was the failure and refusal to comply with the obligations under the contract of his employment, which included, as one of the obligations, that he fulfill a particular role, but it also included an obligation to report for work. And the notice went on to say: [21]

"We accordingly elect to and do hereby exercise the further right granted us under the provisions of said paragraph 12 of said contract to refuse to pay you any compensation until the completion of such role by such other person."

It seems to me by reading this notice, which is the first notice, together with the contract; it is very clear the studio had the right to put the plaintiff on suspension until the end of his failure, refusal or neglect to perform his obligations; but they had another right, too—

The Court: Before you leave that first right, are you now speaking of the right to suspend him for the period required to portray the role of "Hank"?

Mr. Newmark: No, your Honor, I am not.

The Court: What was the period?

Mr. Newmark: During the period of his failure, refusal or neglect, whatever that may be.

The Court: What was the neglect?

Mr. Newmark: The neglect, if your Honor please, was to comply with the provisions of the contract.

The Court: In what respect?

Mr. Newmark: Let us go again to paragraphs 2, 18 and 19. Paragraph 2: That he will render the services hereinafter specified; that he will render his services as an actor in such roles as the producer may designate; also, in paragraph 2, that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and [22] regulations. And in paragraphs 18 and 19, which your Honor read, that he will render his services at such places, and so on, as may be designated; and in paragraph 19, that he will report at the studio, and so forth.

Now, he said, "I am not going to play this role." That was a breach of his contract. They were, under this contract, granted the right primarily to put the artist on suspension until the termination of his—until he, so to speak, wipes the slate clean of his breach of contract. Whether that would last two days or whether that would last two years wouldn't depend upon the time that it took to complete the role. In other words, he might come back, if your Honor please, in three days and say, "I have changed my mind. I am going to do this role, after all, and I want to go back to work." And that is precisely, as I understand, the purpose of the supplementary paragraph in paragraph 12. That says, in effect, that it doesn't make any difference whether the artist changes his mind and doesn't make any difference whether the failure, refusal and neglect endures during the time required for the substitute to play the role. In any event, the shortest period of time that the artist could be put on suspension is the time required for the substitute to complete the role;

but that, if the court please, is the shortest time; not the longest time. In other words, it prevents the artist from coming to the studio in the middle of the production and saying, "I am ready to go [23] back to work. Put me back on salary."

The Court: That much is clear, but what is bothering me and which is not clear: Assuming that I have correctly outlined the practice followed in the construction of this contract; namely, that the artist does not sit around the studio after the manner of a farmer who sits in the country grocery store, to use a slang phrase, "chewing the fat," waiting for some producer or director to tell him that there is a particular picture and a particular role to be portrayed; but that the practice which represented the construction which these parties gave to the contract was that whenever it suited the employer to produce a play in which it desired the services, it would apprise him of that fact and would specify the role and it would indicate when the production would begin or when discussions or conferences would take place. Now, if I have correctly stated the interpretation which the parties themselves gave to the contract, then assumong that the plaintiff breached the contract by his failing and refusing to portray this role of "Hank," how would he know, until he received a call from his employer in conformity with this practice, that there was some other production, some other role in which his services were desired? because he wasn't to perform services of a bookkeeper. His services are defined in the contract. How was he to know, under this contract and the construction which the parties themselves gave to it, when his services were [24] further needed unless he heard from the employer?

Mr. Newmark: Well, if your Honor please, I don't think he would know when his services were needed, so far as acting in productions or reporting for tests or stills are concerned, but that is not the event which gives him his right to compensation. In other words, as your Honor pointed out, he is entitled to compensation even though in a particular week or series of weeks he may not be near the studio. So that the fact that he will not know until he is notified that there is a production isn't the event which gives rise to his right to pay.

On the other side of the picture, if I may answer the court's query by another question: Here is a man who has committed a material breach of a contract, which, under the contract, would have given the studio the right to cancel him out entirely, to discharge him. For some reason in the motion picture business the studios always seem to want to hang onto their stars, but that is neither here nor there. The studio has no way of knowing, certainly, whether this contumacious attitude, or whatever his attitude was, is going to continue or not. Certainly where a man refuses to play a role in a picture there is reason to believe, in the normal course of human events, that there is going to be trouble with this particular man. That is something that is perfectly plain. In other words, there has been some kind of an argument between the artist on the one hand and [25] the studio on the other, which has resulted in the refusal of this man to play a role. Now, the question is, what is the future going to bring? The studio sends him notice, "We are going to put you on suspension during your present failure, refusal or neglect to perform your obligations under your contract."

The Court: What other obligations was he called upon to perform which he refused to discharge?

Mr. Newmark: Well, so far as the particular case giving rise to this is concerned, it was simply the refusal to play this role; but obviously if a studio sets up a given production for a certain time and for a particular artist, then he refuses to play that role, it has to make other arrangements. So that for practical purposes they can't call upon him for the next few weeks or next few months to do other services around the studio. But the important thing, as I see it, is his failure to comply with his obligations under the contract, and whether those obligations relate to the playing of a particular role or whether they relate to any other obligation under the contract does not affect the length of time during which he is to be put on suspension, because in either event the length of time is the continuance of his refusal and neglect to perform.

The Court: And what I am trying to find out is, to perform what?

Mr. Newmark: To perform whatever obligations he has [26] under the contract.

The Court: Again it isn't clear to me which of the obligations, which under this contract he promised to perform, does the record disclose he failed to discharge.

Mr. Newmark: Well, I think, your Honor, that the particular cause for suspension was his failure to portray this particular role, then he was put on suspension. In other words, his particular refusal was to portray a particular role. But what I am trying to suggest to the court is that that is simply the essence in which he refused to perform his contract; and the question which I was about to suggest to your Honor was, once there has been a breach by an artist, even though it relates to something

which, in the normal course of events, could be cured—or let's take this situation. I think I can answer what is in the court's mind. Suppose under the contract the artist was obliged to appear on a radio show at a particular time upon request of the studio, and he refused to do it. He said, "I don't want to do it," and he does not appear. The studio under this contract, I take it, could suspend him, even though the suspension notice might go out after the date when he was supposed to have gone on the radio. Then it would be up to the plaintiff, or to the defendant, as the case may be—I mean the artist—to say, "Well, I have repented. I am ready to go back to work. Please lift my suspension." In other words, the actual time it takes to do the act for which [27] the suspension is made does not determine the length of the suspension.

Mr. Roth: May I ask Mr. Newmark a question, with the court's permission?

Mr. Newmark: Certainly.

Mr. Roth: Assuming the situation just illustrated to the court, and the company has simply given the artist notice that he is suspended by reason of his failure and neglect to perform certain of his covenants and will **remain** on suspension; the artist then comes back to the company with his hat in his hand and tears in his eyes and says, "Please take me back." Would the company have to do it?

Mr. Newmark: I would assume, without checking this over very carefully, that if the company has not elected to terminate the contract, but instead said, "We are just going to put you on suspension," I assume they would have to take him back.

Mr. Roth: What becomes, then, of the language you read to the court on page 10, commencing with line 29, which provides as follows: "Any period during which the producer is entitled to refuse to pay compensation to the artist pursuant to any of the provisions of this paragraph shall, unless sooner terminated, end if and when the artist shall be requested by the producer to and shall render other services hereunder."

In other words, if the company elects the first method of [28] suspension and says, "Until they are ready to call him back," which first method of suspension must be read with the clause which I have just read, nothing the artist can do can put him back on that payroll unless the company wants to put him back.

Mr. Newmark: No. I think there are two things I would like to say. In the first place, you say, "What becomes of this clause at page 10, line 29 of the typewritten contract?" This clause provides for a way in which the period of suspension may be terminated, but it contains the words, "Unless sooner terminated."

Mr. Roth: That is right.

Mr. Newmark: In other words, this isn't an exclusive way in which the suspension can terminate. So that if, in the case you give, the artist comes around and says, "I am ready to perform," the suspension, by its terms, can only exist during the continuance of his refusal. But there was one other thing. I don't recall now whether in the case you gave this repentance occurred before the act was supposed to have taken place or after the act was supposed to have taken place—

Mr. Roth: After he was suspended he comes back to work and he says, "I would like to get back on the pay-

roll." Does that terminate it under that clause which you read to the court?

Mr. Newmark: I don't think it terminates it under this [29] clause.

Mr. Roth: Under any clause?

Mr. Newmark: I would certainly say that if the suspension is not fixed as, at least, of a certain time, or that period has gone by and the suspension is during the continuance of the failure, refusal or neglect, that when the artist comes and says, "I have repented and I am ready to go back to work," the studio can't keep him on suspension for six months or a year, the period of his refusal or neglect and time over. That certainly is my interpretation of this contract. Whether that situation ever occurred or arose in this case is entirely a different situation.

Mr. Roth: Well, I am giving you an illustration. I am not attempting to suggest what happened in this case. It did not happen in this case.

Mr. Newmark: The question I was trying to suggest, in answer to your Honor's question, "When would the artist know when the studio wanted him?" was, when did the studio know when the artist was going to come back and be a good boy, unless he told them so? In other words, is the interpretation to be urged here that where an artist has committed a material breach and the minimum period has expired, namely, when they have gotten a substitute, that irrespective of any manifestation of willingness on the part of the artist to come back to work and to be a good boy, the studio must then immediately put him on the payroll and continue paying him [30] for weeks or months, maybe, before they even get a new role for him, without having any idea whether he

is ever going to come back to work? That is the other side of the question with which we are concerned.

The Court: I have encouraged this discussion with a design; namely, I am seeking, if it be possible, to get the record of this case in such shape where you virtually have an agreed statement. I am inclined to think that there is very little about which there is room for controversy here, and while I recognize that the discussion in part has gone outside the record, I have encouraged that because I am trying to draw out both sides in the hope that we can develop the facts upon which this case should be submitted. The discussion has, I think, tended to crystallize the points wherein you differ as real points of law, rather than any serious dispute as to facts.

It occurs to me that sufficient has been developed to indicate that the motion for summary judgment should not be ruled upon at this time, but rather that counsel should be urged to determine the possibility of amplifying the facts, which could be formulated in an agreed statement. And I am inclined, also, to believe that you can pretty well indicate the extent to which you may differ about this matter of coming to collect the check. Then I am rather impressed with the thought that the right of the defendant to an injunction is involved in contentions which make it [31] rather doubtful that the defendant is entitled to at least an injunction pending the trial. It occurs to me that if, on the one hand, the plaintiff can show that he was warranted in notifying his employer of the termination of the contract, that really would put an end to not only injunctive relief, but any relief on the part of the defendant. On the other hand, unless the plaintiff's position, with respect to the termination of that contract, can be upheld, then I think it is clear the

defendant is entitled to insist that the contract is still in effect.

There would, however, remain the question to which reference was previously made, whether this contract is so worded as to give to the employer the right to hold onto plaintiff's services indefinitely or, in other words, for the balance of his life as long as he sees fit not to report at the studio. I don't recall that either side has cited any case which purported to deal with a situation of that type, but a provision which would have that consequence is one respecting which, I think, exhaustive study would need to be made. My first reaction is that it would be against public policy. I am not prepared to rule, of course, at this time, but as I gather from this discussion the defendant asks for a construction of at least one of the provisions of its contract which would have the effect of binding the plaintiff to give his services for the balance of his natural life. Perhaps I have stated that inaccurately. [32] Put it this way: An interpretation which would deny to plaintiff the right to earn a livelihood for the balance of his natural life, because of a refusal to perform his contract with the defendant.

Mr. Newmark: That is, to earn his livelihood other than working for the defendant for the balance of the term?

The Court: That is right. Now, in brief I am going to suggest that we handle the case in this fashion: That each of these motions be denied without prejudice with the view that we have an early trial on the merits, and to that end that counsel undertake to present an agreed statement, and to the extent that you are not prepared to admit factual matters that you outline what the evidence would be, because it may arise that a ruling would be

made that even in the face of certain evidence no difference would follow in the decision.

I see nothing to be gained by continuing the discussion as to the merits of either the motion for summary judgment or the application for an injunction *pendente lite* at this time.

Mr. Roth: May I suggest a slightly different solution of the matters? If it is proper I would like to say that the summary, which the court has made this morning, of the pleadings, the contract and the issues involved, demonstrate that the court has made a conscientious and thorough study of this entire matter and is thoroughly alive to what the [33] decisive point in the case is. The reason I feel that a slightly different solution would better fit the needs of the parties is this: If both motions are denied at the present time without prejudice and an early trial date is fixed, that would mean this: In the event the plaintiff in the action had an opportunity to perform on the radio, let us say next Monday night, defendant would then immediately petition the court for another order to show cause in an attempt to restrain him.

The Court: I didn't state wholly what I have in mind. I am satisfied that no injunction *pendente lite* should be issued, because of the views which I presently hold, and that more and greater injury would result by the granting of such an injunction than would arise if it were denied pending the trial. So that to express myself more accurately I should say that on the record as I presently see it we would not be warranted in granting an injunction *pendente lite*.

Mr. Roth: In order to eliminate any difficulty, because I understood from Mr. Newmark that we could

have a very early trial in this matter, which, of course, is entirely satisfactory to me, I wonder if we couldn't make this sort of an agreement pending the trial of the action, which has already been discussed between Mr. Newmark and myself somewhat: That is, that plaintiff will not enter into any contract, pending the trial of the action, to do any motion picture work, but [34] he will take advantage of any and every opportunity that he has to appear on the radio between now and the time of trial. Any moneys that he may earn by reason of such appearances we are willing to impound with the clerk of the court, or anyone else that the court may designate or that Mr. Newmark and myself may agree upon. Those moneys, assuming that the defendant in the action has any interest in those moneys by reason of its contract, which it may have but which we are not conceding, they would be, of course, subject to whatever the decision of the court was at the trial of the action. That gives the plaintiff in the action some leeway between now and the date of trial in a field of entertainment, which can't in the least impair or infringe upon any of the defendant's fundamental rights.

The Court: I gather from the affidavits that there have been times, at least, when the defendant has permitted him to do so.

Mr. Roth: Oh, yes. They concede that in their own affidavit.

Mr. Newmark: May I consult for just a moment on that, your Honor?

The Court: Yes.

Mr. Newmark: I was going to suggest, your Honor, before Judge Roth made this last suggestion, that instead

of denying the injunction *pendente lite* that the matter ought to go off calendar. In case the occasion for more vigorously [35] arguing the matter should present itself, namely, another radio appearance, because I think even apart from the matters which your Honor has suggested this morning there are additional features which would, I think, lead to the conclusion that he had no right to terminate the contract and that the contract is still in force, and before any denial, which I think would operate with prejudice as far as subsequent applications, on the same set of facts to another appearance are concerned, would be made, I have intended to ask the court to have the matter go off calendar, because it might be said to have reached that position. But it does seem to me, and for that reason I took the two or three minutes to talk to Mr. Erlick, who is from the studio, that the arrangement Judge Roth suggests, particularly if we can get an early trial, is a fair arrangement. And I gather that this is without prejudice to the rights of any of the parties. In other words, the plaintiff agrees he won't enter into a motion picture contract or do motion picture work, but he doesn't concede that he is not entitled to.

Mr. Roth: Precisely.

Mr. Newmark: And we, on the other hand, say we won't take any more of the court's time in arguing about the preliminary injunction or try to stop Mr. Cummings from going on the radio, but we don't concede he is entitled to do so. In other words, it is entirely without prejudice. And the money, as far as I am concerned, could be impounded [36] with the court clerk subject to any final judgment that is entered in the matter. That would be satisfactory to me, if it is satisfactory to the court clerk, or put it in the bank.

Mr. Roth: The latter part of your statement is entirely satisfactory to me. I don't care where the money is impounded. And, of course, the stipulation is entirely without prejudice. But I think the original suggestion of the court, that we have an early trial and that both motions be denied, ought to be what is done. We want this matter resolved on the *ex parte* application for an injunction, or in lieu of denying the *ex parte* application for injunction—not the *ex parte* application for injunction, but the order to show cause and the motion for summary judgment, the court might submit them both or continue them both to the time of trial, then they will be merged in the trial and will all be disposed of at the same time. Meanwhile we have this stipulation.

Mr. Newmark: We will be operating under this agreement.

The Court: That is perfectly agreeable with the court, that the further hearing on both motions will go over until the time of trial. And meanwhile the stipulation will be in effect that the plaintiff, without prejudice to either side, may proceed to take radio engagements, that all compensation derived therefrom shall be deposited with the clerk of the court awaiting the decision of the case.

Mr. Newmark: And that the plaintiff will not do or [37] enter into any motion picture work during the time.

The Court: Yes. That is also part of the stipulation; that he will not enter into any motion picture work or contract to do that kind of work, pending the decision of the case.

Now, with reference to date of trial: Do you think that, in view of your further efforts toward arriving at an agreed statement, which might, perhaps, in part incor-

porate what we have said here this morning, the case could be tried in a day?

Mr. Roth: I hope so, your Honor. I believe it could be, because if there are any questions of law which we are not agreed upon or which we can't make clear to the court at that time, it can be submitted as questions of law on briefs. I rather believe that we could take all the evidence necessary to try this case, on all the causes of action, in a day. What do you think?

Mr. Newmark: I am inclined to think it may take longer, particularly if we get into the issues of some of the other causes of action as to whether Universal tried to discipline Cummings, and so forth. It seems to me that will take a couple of days, at least, to try. In other words, if we go into the question of whether Cummings was given the right kind of roles to portray his part, or whether the studio tried to keep him down, it seems to me it would take at least two days, even with all our preparatory work being done. If I were to remain here I am sure I could work out with you a [38] great deal of the case, so we would have very little evidence to present, but I am not sure it can be boiled down so much that we can get through in a day.

Mr. Roth: Let's assume two days, then. I don't think it will be more.

The Court: Something was said about counsel going out of the state.

Mr. Newmark: Well, if your Honor please, I will not be here to try the case. I am leaving Monday. As a matter of fact, I am going overseas, so I don't know when I will be back, but I know I won't be back for this case. I will be gone, I think, for the duration of the war, at

least with Germany. And I think Judge Roth is going to be out of the state for two or three weeks.

Mr. Roth: Yes. I am leaving, your Honor, on the 9th, which is Tuesday. I don't expect to be back until about December 5th, but I could try and would be glad to try it any time after December 15th, or the early part of January, 1944.

Mr. Newmark: That would be satisfactory to our office, your Honor.

The Court: Then we will give you the first trial date in January, which would be January 4, 1944.

Mr. Roth: That will be satisfactory.

The Court: I take it that commencing December 15th you will undertake to work out this agreed statement. [39]

Mr. Roth: Oh, yes. I am learning for the first time that Mr. Newmark is going overseas, and I hear the news with regret, because I would like to work it out with him, but whoever in the office is assigned to the case I will make it my business to contact them and I think we can come into court with an agreement on practically all facts, unless we get into some of those other causes of action as to which there will be a dispute.

The Court: I had this in mind: That we endeavor to fix a certain time prior to the actual trial date when you will undertake to file this agreed statement and pre-trial memorandum of points and authorities. I think it would be desirable to have that accomplished some days prior to January 4th.

Mr. Roth: I think I could promise to have it in the hands of the court sometime before December 25th. I rather think sometime between the 20th and 23rd of December.

The Court: I notice that this year December 25th falls on a Saturday. Do you think you can get it in on December 24th?

Mr. Roth: I think so, your Honor. I am rather certain that I could be—

The Court: Should we say that the pre-trial memoranda should be filed by December 30th?

Mr. Roth: Of that I am sure. If I could have until December 30th I am certain of it. [40]

The Court: That would include your memorandum of points and authorities.

Mr. Roth: Yes.

Mr. Newmark: Your Honor, I would just like to make one statement in case I should forget to mention it. I simply want to state this: That our memorandum of points and authorities will probably include cases dealing with the question of whether failure to pay, even assuming our interpretation of the contract to be wrong as to a material breach, particularly where there is a failure under misapprehension which could be corrected by the plaintiff, that the plaintiff is estopped to make any such contention now. I want to make that statement so we will have it on the record.

Mr. Roth: That is what I anticipated.

Mr. Newmark: There may possibly be an amendment setting some of those matters up, which I have already suggested.

The Court: Very well.

Mr. Roth: The trial date is January 4, 1944?

The Court: At 10:00 a. m.

Mr. Roth: And the time set for the pre-trial memorandum is December 30th of this year?

The Court: Yes.

[Endorsed]: Filed Dec. 15, 1944. [41]

REPORTER'S TRANSCRIPT

of Testimony and Proceedings on Trial.

Los Angeles, California, Tuesday, January 4, 1944;
10 A. M.

The Clerk: Robert Cummings v. Universal Pictures
Company, Inc.

Mr. Cooper: Ready for the defendant.

Mr. Roth: Ready.

The Court: The pre-trial points and authorities are quite comprehensive and illuminating. However, I haven't had an opportunity of making an exhaustive study thereof, but I think as the evidence develops that we shall be able to profit by the points that have been advanced.

I believe that in the memorandum opinion that was filed a few days ago I indicated the view that I thought should be taken with reference to the amendments, or second amendment to the answer. I see nothing to be gained by re-examining that aspect of the case at this time. In other words, my present thought is, as indicated in that memorandum of decision, that unless the evidence would support the legal theory that I have indicated would justify such a defense as is outlined in the second amendment to the answer, that I question its validity. However, the evidence may develop some matters that are not presently clear.

I should like to call the attention of counsel to the second count. The amount involved is less than \$3,000, and I question jurisdiction of that count. It appears to be an ordinary action on contract, and unless something further [2] develops I think we should have that ruling, that there is lack of jurisdiction on that particular count.

Then with reference to count one, I should like to leave this suggestion: It would appear that, taking into consideration the admissions contained in the pleadings and the facts conceded in the formal stipulation of facts, that upon proving the allegations set forth in the last sentence of paragraph 6 and the allegations contained in the first sentence of paragraph 7 of the first count, that if the case rested there, that the plaintiff would be entitled to judgment on the first count.

Mr. Cooper: Will your Honor repeat that? I didn't have my complaint before me.

The Court: Yes. I will ask the reporter to read it.

(Statement of the court read by the reporter.)

The Court: I am indicating what I would like to characterize as tentative views, and thereby afford to counsel an opportunity to direct the proof or the argument accordingly. I have already indicated the view presently held with reference to count two, and, of course, count three is the same.

With reference to the last count, I have not had time sufficient to digest the pre-trial points and authorities and to crystalize my thinking thereon, and the trial will have to develop the facts and the law.

Mr. Roth: Counsel and myself have had, prior to today, [3] several telephone conversations in respect to the course of this trial, and it was suggested by myself, and consented to by him, subject, of course, to the approval of the court, that we proceed on count one, because that count, if decided favorably to the plaintiff, is decisive of the lawsuit, and if it is decided adversely, then that we proceed on count four and the counterclaim, because, if count one is, as I say, decided for the plaintiff—and that has just a few questions of fact which have already been

pointed out, the estoppel facts, or the alleged estoppel facts, as far as the counts are concerned, then it resolves itself into an argument on questions of law, and if that method of proceeding is satisfactory to your Honor, I think it would shorten these proceedings and avoid the taking of quite a bit of testimony that may prove to be immaterial.

Mr. Cooper: Counsel is correct, your Honor, and I might add that, as far as defendant is concerned, that procedure will be satisfactory. And I make the further suggestion, in the interest of simplifying the issues, that, as far as the defendant is concerned, we could forget the counterclaim and the request for an injunction, because, first, if the court should decide for the plaintiff, it would be immaterial, and, secondly, should the court hold for the defendant, we are satisfied the defendant would not violate the terms and provisions of the contract.

The Court: I gather, then, that this suggestion, coming [4] from both sides, is designed to get at the heart of the case, and may render it unnecessary to go into matters that would prove collateral in the event of a certain decision on count one.

Mr. Cooper: That is correct, your Honor.

The Court: I am impressed with the advisability of proceeding along those lines, and that may be done.

Mr. Roth: If your Honor please, I had also an agreement with counsel prior to this date in respect of his first amendment to the answer and in respect of the second amendment to the answer, to the effect that all the allegations therein may be deemed to have been denied by the plaintiff.

Mr. Cooper: It is so stipulated, your Honor.

Mr. Roth: On the point that your Honor mentioned at the outset, in regard to count two, that is, that it may not

be within the jurisdiction of the court, we have researched the point somewhat, but, of course, would be happy to submit authorities to your Honor on that point.

The Court: Very well.

Mr. Roth: Shall we proceed, your Honor?

The Court: Yes.

Mr. Roth: I will call Mr. Oscar Cummins. [5]

OSCAR CUMMINS,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Oscar Cummins.

Direct Examination

Q. By Mr. Roth: Your full name is Oscar Cummins?

A. Oscar Richard Cummins.

Q. You are an attorney at law regularly licensed to practice in all the courts of California, and have been such for some years last past? A. I am.

Q. Do you know Robert Cummings, the plaintiff in this case? A. I do.

Q. How long have you known him?

A. About six years.

Q. During the past two years prior to this time have you represented Robert Cummings in the capacity of attorney and business manager? A. I have.

Q. You were representing Robert Cummings during the period of time between April 1, 1943, and June 2, 1943? A. Yes.

Q. Did you, on or about May 26, 1943, appear at the offices of Universal? [6] A. I did.

(Testimony of Oscar Cummins)

Q. Will you state to the court what you went there for and what you did?

A. On May the 26th, on or about 2:30 p. m., I went to the paymaster's office at Universal Studios and asked the paymaster if there was a check there for Robert Cummings, and he leafed through the checks and told me there was no check for Bob. From there I went over to the cashier's office and saw Mr. Steinberg, and I asked him if there was a check there for Robert Cummings, and he said, "Wait a minute," and he went to some files, and came back and said, "No, there is no check for Robert Cummings. He is still under suspension."

Q. What did you do then—go back to your office?

A. I went back to my office.

The Court: May I interrupt for just a moment. Mr. Reporter, will you read that answer slowly?

(Answer read by the reporter.)

Q. By Mr. Roth: What did you do then, Mr. Cummins?

A. The next morning at 11:00 o'clock, Thursday, I called Universal Studios, Stanley 7-1211, and asked for the cashier's office. I said, "This is Oscar Cummins speaking. Is Robert Cummings' check ready?" The man who answered the phone said, "Wait a minute," and came back a few moments later and said, "Bob's check is not ready. We have no instructions to put him back on salary." [7]

The Court: Mr. Reporter, will you read that slowly?

(Answer read by the reporter.)

(Testimony of Oscar Cummins)

Q. By Mr. Roth: Did you get the name of the man to whom you spoke over the telephone?

A. No, I did not.

Q. What did you do after that telephone conversation on Thursday morning?

A. On or about 11:30 I instructed my secretary, Miss Bella Marco, to call Universal Studios and ask for the cashier's office, and I also instructed her to put me on the line as soon as she got the cashier's office. And she called Universal Studios, and pressed the button in my office, and I got on the line with her. I heard her ask the man who answered the phone in the cashier's office, "Is Robert Cummings' check ready?" And the answer came back a few moments later. He said, "Wait a moment," and he came back and said, "Robert Cummings' check is not ready," or "Bob's check is not ready"—I don't remember the exact words—"He is still under suspension."

Q. After that telephone conversation between Bella Marco and someone in the cashier's office at Universal, which you listened to, what, if anything, did you do?

A. I instructed my secretary, Miss Marco, to call Jimmie Smith, Robert Cummings' man, and ask him to go over to Universal and see if there was a check there for Bob.

Q. And then what, if anything, did you do? [8]

A. That is all.

Q. Except that on May 29th you sent this wire from Robert Cummings to Universal?

A. That is right.

Q. Which is set forth in the complaint?

A. That is right.

(Testimony of Oscar Cummins)

Q. Prior to appearing at Universal on Wednesday, May 25, 1943, you had had contacts with many officials of Universal in respect to Bob Cummings, had you not?

A. On repeated occasions.

Q. And you had, on numerous occasions, either personally or through messenger, picked up his check, Bob Cummings' check, in payment of his services?

A. That is correct.

Q. And on those occasions what would you do?

A. I would go to the paymaster's office and the check was usually there.

Q. Between April 10, 1943, and May 29, 1943, did any officer, official, executive or employee of the defendant Universal Pictures Company, Inc., request you to produce Robert Cummings at the studios, or have him at the studios for the purpose of performing services?

A. No.

The Court: May I have that question?

(Question read by the reporter.)

Q. By Mr. Roth: And when I say "request," I mean request [9] orally. A. No.

Q. Do you know whether or not any such request was made between those dates, any such oral request was made between those dates by any official, director, agent or employee of Universal on Robert Cummings?

A. No; there was no such request.

Mr. Roth: You may cross examine.

(Testimony of Oscar Cummins)

Cross-Examination

Q. By Mr. Cooper: I show you a document, which I have heretofore shown to counsel, dated November 27, 1941. Is that Robert Cummings' signature?

A. Yes.

Q. You mailed that in, did you not, to Universal?

A. I don't know whether it was mailed or given to them.

Q. You caused it to be sent to Universal on behalf of Robert Cummings?

A. I think so. I am not certain.

Mr. Cooper: If your Honor please, I offer this in evidence as Defendant's Exhibit A.

Mr. Roth: We object to it on the ground that it is not proper cross examination.

Mr. Cooper: That may be true.

Mr. Roth: But if counsel at this time wants to mark it for identification and its relevancy subsequently appears, we won't quarrel with the authenticity of the document and [10] may stipulate to its admission.

Mr. Cooper: Counsel's technical objections are absolutely correct. I was trying to save a little time.

The Court: It may be marked for identification as Defendant's Exhibit A.

Q. By Mr. Cooper: Mr. Cummins, you were interested, as chief representative of the plaintiff, Robert Cummings, in all his negotiations and matters with the defendant Universal Pictures Company, Inc.; is that correct?

Mr. Roth: That is stipulated, isn't it?

Mr. Cooper: I want to get it fully. A. Yes.

Q. By Mr. Cooper: And you were also his attorney during the period of time in question? A. Yes.

(Testimony of Oscar Cummins)

Q. And you had such authority from Robert Cummings personally? A. Yes.

Q. You have dealt as an agent with Universal Pictures Company for a considerable period of time, have you not, Mr. Cummins, not on behalf, necessarily, only of Robert Cummings, but of others as well? A. Yes.

Mr. Roth: Objected to as immaterial.

Mr. Cooper: It is purely a preliminary question.

Mr. Roth: I will withdraw the objection. [11]

A. Yes.

Q. By Mr. Cooper: You are familiar with the personalities of the employees of the contract department?

A. Yes.

Q. You know most of the officers of the corporation, that is, those that are situated at Universal City?

A. Yes, sir.

Q. And you had negotiated in the past, in connection with matters concerning the contract of Robert Cummings, with Edward Muhl, head of the contract department, had you not?

Mr. Roth: We object on the ground that it is incompetent, irrelevant and immaterial, and it appears already that it is not preliminary, as counsel states, but it is being indulged in obviously for this purpose—

The Court: I don't think it is pertinent to the direct examination.

Mr. Cooper: If your Honor please, it is with reference to the question as to the individuals upon whom the requests were made, and why he made the requests of those individuals, rather than upon the particular officers of the corporation that, as a matter of law, were the ones upon

(Testimony of Oscar Cummins)

whom a demand should be made and who had authority to order payment. I call your Honor's attention to one of the answers of the witness, that on May 27th, when he said he called the offices and talked to some man there, and the man to whom he [12] talked told him he had no instructions to put Robert Cummings back on salary, and obviously the person to whom he talked only paid checks on instructions. The purpose of this question is to show that he did not talk with anyone at Universal Pictures Corporation who had the authority to give instructions, to order the payment of the check.

Mr. Roth: Obviously that is a matter of law.

Mr. Cooper: That is correct.

Mr. Roth: In spite of counsel's statement, the purpose of this particular examination, which is not cross examination, is obviously this, that is, that because the witness knew these various other executives and prominent personnel who were associated with the defendant, that he should have gone to them instead of going to the paymaster or the cashier.

Mr. Cooper: There isn't any question about that.

Mr. Roth: And it is not cross examination, and it is not material. If it is a question of law, and if, as a matter of law, we should have that, that is already before the court, and we can argue it.

The Court: It seems to me that what is sought now might properly be a part of defendant's case, but I am not persuaded that it is a part of the cross examination of this witness. In other words, the question is, has this witness testified truthfully, not what is the legal effect of that testimony.

(Testimony of Oscar Cummins)

Mr. Cooper: I don't quarrel with the veracity of the [13] witness, but I certainly think we have a right on cross examination to show the color of the shadow. Even though we do not necessarily have to attack the veracity of a witness on cross examination, we may bring out the full picture and the light and the color of the shadow.

The Court: I rather think you will need to put that in as part of your case.

Mr. Cooper: Very well. I won't quarrel with the court on that.

Q. By Mr. Cooper: Now, you stated in your direct examination that you had been in the habit of picking up Mr. Cummings' check and that you usually found it there. What did you mean by that?

A. At the time that Bob Cummings was supposed to be on salary, I went to the paymaster's office and there the check was.

Q. Did you mean to imply that on some occasions it had not been there, that there were occasions when the check was not there when you went there?

Mr. Roth: I object to that as incompetent, irrelevant and immaterial. If we are going to go into that, it would be necessary to go into a specific set of circumstances.

The Court: I am wondering if we would not find ourselves involved in trying perhaps some of these matters that were eliminated when the third count was dismissed.

Mr. Cooper: If your Honor please, that isn't my purpose [14] at all. Very briefly, I am going back to the general subject matter of my preliminary question. I think this is quite proper cross examination, because the

(Testimony of Oscar Cummins)

question was asked by counsel, and he said that when he went there the check was usually there. I want to find out what he meant by the word "usually."

The Court: May we have the pending question?

(Pending question read by the reporter.)

The Court: I think the witness can answer that question.

A. The answer to that is this, your Honor: On no occasion when the check was supposed to be there was it not there. There were frequent occasions when, for a day or two, they wouldn't pay Bob for a day or two, and I went there and argued about it. When the checks were supposed to be there they were usually there.

Mr. Roth: Pardon me a second. May I interject and ask the witness a question?

Mr. Cooper: I have no objection to an interruption, counsel.

The Court: I rather think you will make better progress if you will—

Mr. Cooper: Very well.

Q. By Mr. Cooper: On those occasions when you would not find the check there, for whatever reason it was, you would go to someone else, would you not?

Mr. Roth: That is not his testimony. I object to it on [15] the ground that it assumes a fact not in evidence.

Mr. Cooper: Maybe I misunderstood the witness. I have no objection to your asking a question to straighten it out. Will you please read the last answer of the witness?

(Record read by the reporter.)

Q. On those occasions, Mr. Cummins, did you go to the paymaster's office—

A. Yes.

(Testimony of Oscar Cummins)

Q. And, for whatever reason it might be, there was not a check there, when you thought it should be there?

A. I didn't say that.

Q. On those occasions when you went to the paymaster's window and asked for a check and the check wasn't there—

A. I didn't say that either.

Q. What did you say, then?

A. I said on occasions when Bob worked a day or two extra, and his check wasn't there, or it wasn't in the proper amount, then I would ask about it.

Q. Let me ask you this question: Did you ever go there when, for one reason or another, you thought a check was supposed to be there and didn't find one there? There were such occasions, were there not, Mr. Cummins?

Mr. Roth: Will you let the witness answer one question at a time? I think the first question is objectionable, but I didn't object.

The Court: Will you split the question? [16]

Mr. Cooper: It is the same question, if your Honor please, and, of course, it is leading, but we have permitted some leading questions on direct examination. The second portion of the question may be stricken.

The Court: Then will you read the question?

(Question read by the reporter as follows: "Let me ask you this question: Did you ever go there when, for one reason or another, you thought a check was supposed to be there and didn't find one there?")

A. As amended, I don't remember such an occasion.

(Testimony of Oscar Cummins)

Q. By Mr. Cooper: In your earlier testimony on cross examination you said that sometimes a check was one or two days late?

A. I didn't say it was one or two days late.

Mr. Roth: I object to the question on the ground that it assumes a fact not in evidence.

The Court: The witness has already answered that that was not his testimony. It begins to look like possibly an expression was used by the witness that may well have been confusing. As the interrogation has proceeded, it begins to develop that he did not use apt or exact language in answer to the earlier question.

Mr. Cooper: Very well, your Honor. I will make it quite clear.

Q. Is it your testimony, then, that you recall no occasion of going for a check when you thought one should be [17] there, to find that it was not there?

A. That is substantially correct.

Q. On one occasion when you went there you found a check was there which you believed to be an incorrect amount?

A. Yes.

Q. There were such occasions?

A. Yes.

Q. And you then went to whom?

A. Generally to Mr. Muhl.

Q. Who was head of the contract department?

A. That is right.

Q. And the matter would either be explained or straightened out?

A. I either got the money or didn't get it.

Q. It was either explained or straightened out?

A. Yes.

(Testimony of Oscar Cummins)

Q. On May 26th you said you first went to see the paymaster?
A. That is right.

Q. Is that the paymaster, Mr. Steinberg?

A. No. There was a paymaster out there at Universal who had all the checks of the employees, the contract players, and all other employees.

Q. And you merely made inquiries for the check, whether or not there was a check for Bob Cummings, or words to that effect? [18]
A. That is right.

Q. Then you went to the cashier?

A. That is right.

Q. Where is the cashier's office with respect to the paymaster's window?

A. Right around the corner.

Q. And you saw Mr. Steinberg, the cashier?

A. Yes.

The Court: Do I understand that Mr. Steinberg was the cashier at this time?

Mr. Cooper: That is the testimony of the witness, that Mr. Steinberg was the cashier.

A. That is the man I saw.

Mr. Roth: I don't think that is the fact.

Mr. Cooper: That is the reason for the question. Will you stipulate that Mr. Steinberg was paymaster and not cashier?

Mr. Roth: The only way I knew the fact was from the affidavits on file.

Mr. Cooper: Counsel, I wouldn't have asked for the stipulation, only I thought it was from your own personal knowledge.

(Testimony of Oscar Cummins)

Q. By Mr. Cooper: In any event, the second person you saw was the cashier? A. Steinberg.

Q. Did you go to the cashier's office?

A. I went to Steinberg's office. [19]

Q. What made you think he was cashier?

A. That is the information I had.

Q. Is there a cashier there, do you know?

A. If he states that Steinberg is not the cashier, I don't know.

Q. You have a positive recollection that you saw Mr. Steinberg personally? A. Yes.

Q. During the time, on May 26th and May 27th, that you made these requests for Robert Cummings' checks, or check, rather, did you ask Edward Muhl whether a check was ready? A. No.

Q. Did you ask Cliff Work if a check was ready?

A. I probably couldn't have gotten to his office.

Q. Did you ask Dan Kelley if his check was ready?

A. No.

Q. Did you ask anyone in the contract department?

A. No. It wasn't necessary.

Mr. Cooper: I move to strike "It wasn't necessary," as a voluntary statement.

The Court: That may go out.

Q. By Mr. Cooper: Did you want the check?

A. Certainly.

Mr. Roth: I would like to have an objection appear before the last answer, and ask that it be stricken, on the ground that the question is objectionable and calls for a state of [20] mind, which is not testified to or sub-

(Testimony of Oscar Cummins)

stantiated by the evidence. It is not proper cross examination. What the intentions of this witness were are immaterial to this lawsuit.

The Court: I am not clear as to just the basis for that objection. Suppose, for illustration, that the plaintiff's agent were to admit that he went to the studio and likewise carried on these telephone conversations, not for the purpose of discharging or seeking to enforce any of plaintiff's rights, but merely to mislead the defendant, that would be purely in his mind, of course. It is true that it would not rest with the witness to say on direct examination that he was acting in good faith. That will have to be determined by the facts and the circumstances as they transpired.

Mr. Roth: I objected to this question because I considered it a fly question and asked for the purpose of imputing that there might not have been good faith. The only way the court can determine whether or not there was good faith in this demand is by what the plaintiff actually did. In his secret heart, let us assume, for the purpose of argument, that the plaintiff hoped that they would not perform their contract, if he nevertheless went there and performed his obligations and made his demands, what his secret hopes were wouldn't make any difference; the motive wouldn't make any difference. The witness has already answered the question, but my point is that thereafter, if [21] they had that hope—Mr. Oscar Cummins or Robert Cummings—if they performed their contract, Universal was bound to meet the demand. That is our point. I see ramifications and implications as to the significance of the question, which I don't care to argue at this time, because, for instance, I would rather

(Testimony of Oscar Cummins)

not make mention of what I think is in the mind of counsel by this question. It is not an accidental question; it is a calculated question.

The Court: Only to the extent that it may serve to throw any light on the credibility of any other testimony of the witness.

Mr. Roth: If that is the purpose of the question, I withdraw my objection.

The Court: That is the sole theory on which it is a proper question.

Mr. Roth: I withdraw my objection.

Q. By Mr. Cooper: On occasions when there had been disputes in the past on matters of salary and other things in connection with the contract, you had always taken the matter up with Ed Muhl, had you not?

Mr. Roth: Objected to as immaterial and not proper cross examination.

The Court: It is not clear as to the theory upon which this line of interrogation is being pursued. In other words, does the defendant dispute the testimony of the witness to the effect that ordinarily checks for the plaintiff [22] would be found in a certain office, that that is the way the defendant transacted its business and established a practice which employees, such as the plaintiff and his representatives, followed, and that, consistent with that practice, the plaintiff's representative called at the paymaster's office and requested a check, presumably representing compensation for the plaintiff, and that the check was not given?

Mr. Cooper: If your Honor please, I do not dispute that at all. As a matter of fact, we will concede that no

(Testimony of Oscar Cummins)

check was ready, that defendant did not intend to have a check ready. There isn't any question about it. That is a fact, and that is our position; none was ready and none was intended to be ready. But, if your Honor please, this is an equitable proceeding. Plaintiff is asking the court to terminate this contract. And we pleaded in the answer, and I intended the implications of the former question. It is our contention, if the court please, that the witness' so-called demand was not made in good faith. This witness knows, and it is a contention of the defendant, that the man he should have seen was Edward Muhl or one of the executives of the studio, as he had done in the past.

Mr. Roth: There is no showing that he did that in the past. We object to that statement. I want to apologize to counsel for the use of the word "fly."

The Court: May we have the pending question? [23]

(Question read by the reporter.)

The Court: It strikes me that you are now going into the field of your defense, namely, that there are equitable factors here which would justify concluding that the plaintiff is not entitled to the relief he seeks. But I do not think it is pertinent to the direct examination.

Mr. Cooper: With due deference to the court, I think I should suggest that they are pertinent to that issue, but, nevertheless, I sincerely suggest to the court that it is also proper cross examination. Here is a witness who testified with respect to making the demand, and certainly we have the right to find out why he didn't make the demand upon the proper person. We are not limited in cross examination to the literal words and questions of the direct examination.

(Testimony of Oscar Cummins)

The Court: Now, whether or not plaintiff should have made any demand at all on the theory of the first count I don't think is an element essential to the plaintiff's right to recover. In other words, the contract required payment without any demand. If there was some breach or failure on the part of the plaintiff, to relieve the defendant from making the payment, that is something separate and distinct from whether or not he went to the right place to make a demand.

Mr. Cooper: I wil agree with your Honor in this. That, assuming that payment was due, would be due him without a [24] demand—there isn't any question about that—but, if your Honor please, there is another question involved, a very important question involved in this equitable proceeding; did the plaintiff do equity? Did he do the right thing in good conscience? It is a very important question in determining the question as to whether or not he is entitled to a rescission and termination of the contract, as distinguished from the money due him. Assuming, for the purpose of argument, that that might have been the case, which we do not concede, if your Honor please, but that that might have been a very important technical point to consider—I am not going to argue the law, as it is set forth, if your Honor please, in the—

The Court: It is my thought that if there were any other circumstances which protected the defendant from the usual consequences ensuing upon a failure to perform one of the most important parts of the contract as far as the plaintiff is concerned, namely, payment, those are matters which are peculiar to the defense. In other words, if this case rests upon a state of facts which disclose that the plaintiff was not paid at the time, in so far as the

(Testimony of Oscar Cummins)

evidence discloses, that payment was due, and that the defendant did nothing. I don't think we need any more equitable elements to entitle plaintiff here to a decree. If there are these other factors which would indicate, taking into account various pertinent circumstances, that [25] the plaintiff should have done other than he did, those are matters which I think are proper to be brought out, but not as part of the cross examination of this witness, because I don't think the plaintiff needs to establish anything more in order to obtain a decree than that he wasn't paid at a time when apparently he should have been paid.

Mr. Cooper: Well, I am not going to argue it. I don't think the matter is of sufficient importance to argue about it further at this time. I note an exception. And, in the interest of time, I will proceed with another question.

Q. By Mr. Cooper: You had a conversation, did you not, with Mr. Ed Muhl on the 28th of May—to refresh your memory, at the hour of 10:06 a. m., May 28, 1943? To refresh your memory, it was the day before you made your—you sent the notice of May 29th. a day or two after the alleged request for payment?

A. I don't remember whether I had a conversation on that day or not.

Q. Solely for the purpose of refreshing your recollection as to the conversation—I do not intend to go into this phase of the conversation, if the court please, except solely for the purpose of refreshing his recollection as to the particular conversation—Do you recall a conversation with Edward Muhl wherein you discussed the PRC?

A. Yes.

(Testimony of Oscar Cummins)

Q. Now, do you recall that that conversation took place [26] at 10:06 a. m. on the 28th of May, 1943?

A. No, it did not. It occurred after the breach, after the notice was sent.

Q. In other words, it is your testimony, then, that the conversation in which you discussed the PRC was definitely and unequivocally after May 29th?

A. No; I am not certain whether the conversation about this PRC was in April or May. I think the conversation as to PRC was in April.

Q. Then you do recall having a conversation with Edward Muhl about PRC? A. Yes.

Q. Are you certain whether that was before or after May 29th?

A. I think it was sometime in April. I think at that time Mr. Muhl called me on the telephone and asked me—it was after the completion of the picture called “Fired Wife,” and that was in April, when Muhl called me and asked me if I had heard that Metro was interested in Robert Cummings, and I said no, that PRC had called me, but I didn’t know anything about Metro. I am quite certain as to that.

Mr. Cooper: If your Honor please, so that I can tie down this conversation—I do not offer this to prove the substance of the conversation, but so that I might fix the conversation. This was the conversation I am referring to, which was substantially as follows. This is not proof of the [27] conversation, but merely to establish the conversation, so that we can fix the date. The conversation that I have reference to is the conversation at which Mr. Muhl called you and said he had heard that Robert Cum-

(Testimony of Oscar Cummins)

mings had been offered to Metro, and you stated that you didn't know anything about it, but that you had heard something about PRC, a producing organization that you had never heard of before, and that they had called you, asking about Cummings' availability. Is that the substance of it down to that point, just for the purpose of fixing the time of this? I intend to offer the substance of it in our defense.

Mr. Roth: I feel compelled to object, on the ground that it is not proper cross examination. I didn't object at first, because I asked the witness on direct whether he had any conversation with officers of Universal, and on that theory I think the question is perfectly admissible on cross. Then counsel stated preliminarily, when he tried to ask his question, that he was asking it for the purpose of fixing the time, and I didn't object to that. Mr. Cummins is going to be here; he is available. If the questions you are now propounding to Mr. Cummins are going to be relative to your defense, which I am not conceding, you will have an opportunity to call him and put him on in regular order.

Mr. Cooper: Let me withdraw that last question.

Q. By Mr. Cooper: Referring now to this PRC conversation, which you say now, to the best of your recollection, was [28] some time in April—am I correct so far? A. Yes.

Q. In that PRC conversation did you suggest to Mr. Muhl anything about Bob Cummings' check not having been paid?

Mr. Roth: Objected to as incompetent, irrelevant and immaterial, it being evident from the question itself that

(Testimony of Oscar Cummins)

he couldn't have, at that time, in April, because the check wasn't there in April.

Mr. Cooper: That is correct. Off the record: I wanted to fix that conversation, because it is our contention that that conversation took place the day after the alleged demand was made and the notice was sent, that he did have a long conversation with Ed Muhl, in which many things were discussed, and not a thing was mentioned about this angle. That is why I was so anxious to fix the conversation, not for the purpose of proving the truth of the conversation, but so that we might fix the time.

Mr. Roth: If it is not for the purpose of proving the truth of the fact—

Mr. Cooper: No.

Mr. Roth: Then it is not proper cross examination. I didn't go into any conversation with Ed Muhl as to demanding the check. The witness already testified, in answer to one of counsel's questions, that he didn't make a demand on Ed Muhl or any of these officers, and if there is any relevancy to this, I think it ought to be in proper form, so that I [29] at least can have some information as to what the purpose of the question is.

The Court: Let me interrupt to point this out: The witness having testified that he had no conversation with anyone representing the defendant on the subject matter of the check or compensation for plaintiff, except those whom he has referred to on direct examination, it would seem to me that you already have the answer, so far as

(Testimony of Oscar Cummins)

there is any answer relevant on cross examination to the question or series of questions you have been asking. If you seek further to show that there was a conversation between this witness and some officer or representative of the defendant during the period that is covered by the witness' direct examination, it is not clear to me what difference it would make that he did have such a conversation. He already conceded that he didn't talk to anybody else, as far as the defendant was concerned, on the subject matter of plaintiff's compensation.

Mr. Cooper: I feel that this is a perfectly proper question, and a necessary question, as a foundation for the conversations which were later held.

Q. By Mr. Cooper: Is it not a fact that on May 28, 1943, at the hour of 10:06 a. m., you received a phone call from Edward Muhl, in which he stated to you that he had heard a rumor that Metro was interested in Robert Cummings, and did you know anything about it, and you stated that you didn't [30] know anything about it, and you further stated that PRC, a producing organization that you had not heard of before, had called you and asked about Cummings' availability, and you advised that Cummings was engaged in work in connection with the establishment of an air shuttle service, and if anybody wanted him they would have to see General Arnold, of the Army Air Corps, to get him. You then asked Mr. Muhl why he was disturbed about it, and Mr. Muhl said

(Testimony of Oscar Cummins)

to you that he wasn't disturbed, that he merely considered it a rumor, but decided to get you, since you would know all about it and have it disproved. He then said that he wanted to know if anybody had suggested to Metro that Cummings' suspension had been terminated or that he was in any way free of his contract with us or free to work with anybody else. And you said you were positive there was nothing like that. Did you have such a conversation on May 28th, in substance or in effect?

Mr. Roth: Objected to as immaterial and not proper cross examination, and anticipating the defense.

The Court: I am inclined to think that, on the ground that it is not proper cross examination, the objection is well taken, and that will be the ruling.

Mr. Cooper: Very well. I do not want to intentionally prolong it, but just to save time, I will ask this.

Q. By Mr. Cooper: Didn't you further have a conversation on the 3rd day of June, 1943, first over the telephone, and [31] second, at Ed Muhl's office, wherein, in effect, you admitted that you had had a phone conversation on May 28th, in which—

Mr. Roth: That is objected to as not proper cross examination and immaterial.

The Court: It is not cross examination. Sustained.

Mr. Cooper: Very well. There are no further questions, if your Honor please.

Mr. Roth: That is all. Call Bella Marco. [32]

BELLA MARCO,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Bella Marco.

Direct Examination

Q. By Mr. Roth: Miss Marco, will you keep your voice up? A. All right.

Q. You reside in the County of Los Angeles, do you not? A. Yes.

Q. And are you engaged as secretary by Mr. Oscar Cummins? A. Yes.

Q. And you have been engaged in that capacity by Mr. Oscar Cummins for at least two years last past?

A. About a year and a half.

Q. Were you employed by Mr. Oscar Cummins in the month of May, 1943? A. Yes, I was.

Q. Do you recollect having been instructed by Mr. Cummins sometime in the month of May to make a telephone call to Universal Pictures Company, Inc., the defendant in this action? A. Yes, I do.

Q. Can you fix the time of that instruction?

A. It was May 27th. It was around 11:30 a.m.

Q. May 27, 1943? [33] A. Yes.

Q. Will you tell us what Mr. Cummins said to you and what you did?

A. Mr. Cummins told me that he had called Universal, and he would like me to call them and buzz him when I got them on the line, that he would like to listen in on the conversation, and to get the cashier's office on the phone.

Mr. Cooper: I am not going to object to this, but I suggest that that would be a violation of the Federal Communications Act.

(Testimony of Bella Marco)

Mr. Roth: Listening over the telephone?

Mr. Cooper: Yes. I will withdraw it, but I merely suggest that.

Mr. Roth: We will take that chance.

Mr. Cooper: I am not going to make the objection. But there is a Circuit Court of Appeals decision to that effect.

Q. By Mr. Roth: Miss Marco, tell us who you called and what the conversation was.

A. I called Universal and asked for the cashier's office, and a man answered, and I told him then that this was Bella Marco, Mr. Cummins' secretary, and that I would like to know if there was a check for Bob Cummings. He said, "Just a moment; I will see," and he left the phone and returned shortly, and told me there was no check for Bob Cummings, that he was on suspension.

The Court: May I interrupt just a moment? Very well. [34]

Q. By Mr. Roth: After you had finished your telephone conversation did you get in touch with Mr. Smith?

A. Yes. Mr. Cummins asked me to get in touch with James Smith, which I did.

The Court: The same day?

A. Yes, sir; right away.

Q. By Mr. Roth: James Smith was employed by Robert Cummings? A. That is right.

Q. Did you talk to James Smith?

A. Yes. I called him and asked him if he would go over to Universal and see if there was a check ready for Bob Cummings.

Mr. Roth: You may cross examine.

Mr. Cooper: No cross examination.

Mr. Roth: That is all, Miss Marco. Mr. Smith. [35]

JAMES SMITH,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. James Smith.

Direct Examination

Q. By Mr. Roth: Were you employed by Robert Cummings, the plaintiff in this action? A. Yes, sir.

Q. Were you so employed during the month of May, 1943? A. Yes.

Q. In the latter part of the month of May, 1943, were you requested by Miss Marco, the lady who just left the witness stand, to go to Universal Pictures Company, Inc., and pick up the check of Robert Cummings?

A. Yes, sir.

Q. What did you do?

A. I didn't go over. I telephoned.

Q. Where did you phone from?

A. Mr. Cummings' home.

Q. Where is the home of Robert Cummings?

A. Van Nuys.

Q. Will you state to the court why you telephoned?

A. Trying to save gas, for one reason.

Q. State what you said on the telephone and who you talked to, and what was said on the other end. [36]

A. I called Universal Studios and asked for the paymaster's office.

Q. Were you connected?

A. Yes. And they gave me a name, but I don't remember the name of the paymaster; I don't remember

(Testimony of James Smith)

the name. I asked had Mr. Cummings' check been picked up, and he said, according to his records, that Mr. Cummings was on suspension.

Mr. Roth: Cross examine.

Mr. Cooper: No cross examination.

Mr. Roth: That is all. Call Robert Cummings. [37]

ROBERT CUMMINGS,

called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Robert Cummings.

Direct Examination

Q. By Mr. Roth: Mr. Cummings, between the—

The Court: Just a moment. You are the plaintiff in this lawsuit? A. Yes, sir.

Q. By Mr. Roth: Mr. Cummings, between the date of April 10, 1943, and June 1, 1943, did any officer, executive, agent or employee of Universal Pictures Company, Inc., the defendant in this lawsuit, call you up or converse with you, or make an oral demand upon you to appear at the studio to perform any services?

A. No, sir.

Mr. Roth: That is all.

Cross-Examination

Q. By Mr. Cooper: Mr. Cummings, had any demand been made on you on or about the 10th of April, 1943, to appear at the studio?

(Testimony of Robert Cummings)

Mr. Roth: Objected to as not cross examination. It is already proven that such a demand was made, written demand.

Mr. Cooper: No, that isn't true. [38]

Mr. Roth: Yes.

Mr. Cooper: Would you read that again, please?

(Record read by the reporter.)

Mr. Roth: Although I accept the stipulation.

Mr. Cooper: I can't stipulate to it, because that is not a fact.

Mr. Roth: May we have the question?

(Question read by the reporter.)

Mr. Roth: I withdraw the objection.

A. That I can't say, as to the date.

Q. By Mr. Cooper: Let me refresh your memory. This is solely for the purpose of refreshing your recollection. You recall, do you not, that you alleged in your complaint in this action—you read the complaint before you signed it?

A. Naturally.

Q. That a demand was made upon you to perform the role of "Hank" in "Fired Wife," and that you refused to perform that role. You allege that in your complaint. You said it was on or about the 10th of April, 1943. That is the demand that I have reference to.

A. I see.

Q. In what form was that demand made?

A. Was my demand made?

Q. No. Let us get this straightened out.

A. Yes.

(Testimony of Robert Cummings)

Q. You allege in your complaint that you were requested [39] to perform the role of "Hank" in "Fired Wife," that is, Universal made a demand on you to perform the role of "Hank" in "Fired Wife," and you said in your complaint that was on or about the 10th of April, 1943. Are we clear? A. Yes.

Q. In what form did you receive notice from Universal of that demand to perform the role of "Hank" in "Fired Wife"? Do I make myself clear? A. Yes.

Q. All right.

A. I spoke to Bob Speers. We were very good friends—I have forgotten whether it was at his office—but I had many conversations about that, and we talked at length about this picture several times, and Bob, I should say, made what technically would be called a demand on my services by the studio to appear as "Hank" in the picture "Fired Wife" orally, as I remember it.

Q. Did Mr. Cummins, your agent, inform you that he had received a notice in the form of a telegram dated April 10th, as follows:

"Mr. Robert Cummings,
Care Oscar Cummins,
8511 Sunset Boulevard,
Los Angeles, California.

April 10, 1943.

You are hereby instructed to report to us at our studio at Universal City, California, at the office of Mr. Dan Kelley, [40] at ten o'clock Monday morning, April 12, 1943, for the rendition of your services under your contract of employment with us dated November 21, 1938, as

(Testimony of Robert Cummings)

heretofore amended and extended, in connection with the portrayal of a role in our photoplay now entitled 'Fired Wife' and/or the rendition of such other services as we may require under said contract, as amended and extended.

UNIVERSAL PICTURES COMPANY, INC.

By Edward Muhl,

Assistant Secretary."

Mr. Oscar Cummins, your agent, informed you that he had received that telegram?

Mr. Roth: That is objected to on the ground that it assumes a fact not in evidence. There is no evidence before the court that Oscar Cummins ever received that telegram.

Mr. Cooper: That isn't the question. The question is, did Oscar Cummins inform him of that. Answer that yes or no.

Mr. Roth: I don't understand that you have a right to go into facts not established by the evidence on direct examination. It is not cross examination, and we object. Will you read the question, please?

(Question read by the reporter.)

Mr. Roth: That is objected to, if your Honor please. That is the same objection we would have to the question, "Have you stopped beating your wife? Answer yes or no." I don't know what the witness' answer is going to be. Oscar [41] Cummins says he never received the telegram.

The Court: The question in its present form is open to criticism. I think it will be necessary to revise it.

Mr. Cooper: I think it will be necessary to pin it down to the period that is relevant.

(Testimony of Robert Cummings)

Q. By Mr. Cooper: Did you know or learn, in any manner, shape or form, on April 10th or 11th, that Universal wanted you at the studio, other than your conversation with Bob Speers?

A. I may have. I don't remember. There was so much talk about it that I don't remember.

Q. Were you informed by anyone that a telegram had come in requesting you to appear at the studio on April 12th, on April 10th or 11th?

A. I only know of the telegrams which I have in my complaint, and the others—there have been so many from Universal that I really can't remember them.

Q. I show you a copy of a telegram, which your counsel has seen, the telegram of April 10th, and ask you to read this telegram. A. Aloud?

Q. No; to yourself, Mr. Cummings.

A. That I can't say. If I ever received it or not I don't remember.

Q. Did you ever learn of the contents of that telegram from any source between April 10th and April 12th, 1943? [42]

A. Yes. I learned that—not the exact contents of that telegram. I knew that Universal wanted me to play the part of "Hank" in "Fired Wife." It was all public, and every newspaper in town was getting it at that time, and it was a public secret that I had refused to play the part, but whether or not I got it from that telegram I don't know, or whether I ever saw that telegram or not I can't say. It is very familiar there. That is legal terminology, and I have been at two major studios and have seen many such notices, naturally.

(Testimony of Robert Cummings)

Q. Do you recall whether or not your agent, Oscar Cummins, told you at any time on April 10th or April 11th that the studio wanted you for any services at all?

A. Well, I can say this, that naturally we had discussed the making of "Fired Wife" pro and con, and Oscar Cummins and I were so familiar with the subject that Universal did want me to do the picture, that it was unnecessary to discuss whether or not they wanted me, that I don't remember whether we ever needed to discuss it.

Q. Do you recall whether or not you did?

A. I did not.

Q. Do you recall whether or not Mr. Oscar Cummins told you that he had received a telegram from them?

A. I don't know.

Q. Were you in town on April 10th?

A. I can't remember that. [43]

Q. Do you remember where you were on April 11th?

A. No.

Q. April 12th? A. No.

Q. Can you think back? Were you in the Civilian Air Patrol at that time?

A. Yes; I was in the Civil Air Patrol, Glendale, California, was my office.

Q. You owned a Cessna airplane, which you have turned over to the Civil Air Patrol?

A. That is right.

Q. Do you recall, for the purpose of refreshing your recollection, as to where you were on April 10th, 11th and 12th, 1943, as to whether or not you were out of the State of California?

A. It could be possible.

(Testimony of Robert Cummings)

Q. Do you recall where your airplane was at that time?

Mr. Roth: Objected to as not cross examination and immaterial.

The Court: I am trying to see in what respect your present line of interrogation bears upon the direct examination.

Mr. Cooper: If your Honor please, he said that no demand was made upon him, and, with counsel's permission, I would like to approach the bench. I don't like to state the reason out loud, because the witness is on the witness stand. [44]

The Court: In other words, it is conceivable that no demand was made upon this witness because, let us say, he could not have been contacted?

Mr. Roth: I suspected that. Irrespective of what may be in Mr. Cooper's mind, I don't think it is necessary to approach the bench. I will withhold any objection.

Q. By Mr. Cooper: Did you fly your plane during the month of April, 1943—I mean this Cessna plane?

A. My plane—I don't think so. As I recollect, my plane was donated to the United States government, to be used on anti-submarine patrol in the Gulf of Mexico. That donation was made voluntarily I think sometime around the first of the year, before April.

(Testimony of Robert Cummings)

Q. Let me ask you this.

A. And I was not flying my airplane at that time, and, naturally, I had 64 planes at my disposal, and—

Q. What I am particularly trying to find out is where you were on April 10th. A. I wish I knew.

Q. Would it help you to know that your plane was in El Paso on April 5, 1943?

A. Yes. That substantiates my recollection, which I gave you formerly, that I had donated the plane to the United States government, because they put it on anti-submarine patrol, the Azores Patrol.

Q. Patrol No. 2? [45] A. No.

Q. Very well.

A. And therefore I couldn't have been flying it, because the plane was flown to El Paso for delivery to the government by another party.

Q. That does not help refresh your recollection as to where you were? A. I am sorry, it does not.

Q. Let me ask you this question: When you are out of town do you leave anybody at your home? Does anybody stay at your home, or does your man servant, Mr. Smith, go with you on occasions?

A. On occasions, yes. He has flown across the country with me. And usually at my home there was somebody there. Naturally, in these present times it is not always possible to have somebody there, but usually there was somebody at my home. But I usually referred all messages and communications to 527 California Bank Building, in Beverly Hills.

(Testimony of Robert Cummings)

Q. That is Oscar Cummins?

A. Oscar Cummins' office. And my secretary, Bella Marco, was usually there to take them, except on Saturdays and holidays.

Mr. Cooper: If your Honor please, that is all that I have to ask at the present time on cross examination.

Mr. Roth: That is all. [46]

Mr. Cooper: He will be available, however?

Mr. Roth: Yes. At this time there is one correction of an error which counsel for defense inadvertently made in a question he asked. The complaint, I believe, was verified by counsel, and not by Robert Cummings. I didn't object to the question. It didn't make any difference, but I suggest it, to cure the record.

Mr. Cooper: You mean Robert Cummings didn't sign the complaint?

Mr. Roth: No. He was out of town.

Mr. Cooper: I didn't know that.

Mr. Roth: We rest on the first count, and on the second count, assuming that we can satisfy the court that the second count is before the court.

Mr. Cooper: May it please the court, at this time we will make a motion for dismissal. I do not care to argue the matter at this time, because we may be going over ground that we will be going over possibly later.

The Court: The motion is denied. [47]

DEFENSE.

Mr. Cooper: Call Mr. Robert Speers.

ROBERT SPEERS,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Robert Speers.

Direct Examination

Q. By Mr. Cooper: Mr. Speers, what is your business or occupation?

A. I am a casting director at Universal Studios.

Q. And you have been such for how long?

A. Approximately two years.

Q. Do you know the plaintiff in this case, Robert Cummings? A. Yes, I do.

Q. As Mr. Cummings stated on his direct examination, you and he are good friends? A. That is right.

Q. In addition to being associated at the studio?

A. That is true.

Q. Did you have occasion some time during the month of April, 1943, to have some conversation with the plaintiff with respect to the possibility of his portraying the role of [48] "Hank" in "Fired Wife"?

A. Yes, I did.

Q. Now do you recall having a conversation with him on or about the 3rd day of April, 1943?

A. Yes, I do.

Q. Now, you filed an affidavit in this court, dated October 21, 1943, did you not? A. That is right.

Q. A copy of which I show you.

(Testimony of Robert Speers)

Mr. Roth: Are you showing him a copy of his affidavit?

Mr. Cooper: Yes. You have it, counsel.

Q. By Mr. Cooper: You have gone over this affidavit since you made it, have you not?

A. Yes, sir.

Q. In fact, as late as yesterday afternoon, with me?

A. That is right.

Q. In your affidavit of October 21, 1943, you refer to a conversation of April 10th and a conversation of April 12th, 1943. Do you recall the conversations that you referred to in your affidavit? A. Yes, I do.

Q. Since making that affidavit have you refreshed your memory as to whether or not the dates of April 10th and April 12th were the correct dates? A. I have.

Q. And from what have you refreshed your memory?
[49]

A. From several sources. I consulted the people in my office, and I consulted the studio files, and discovered therein a letter which was written by the company to Mr. Cummings, dated April 9th, which fixed the approximate time of my conversations with Bob and indicated that the original date—that I was in error on the original date.

Q. Directing your attention to the 10th of April, 1943, did you have before you on your desk, on the 10th of April, 1943, which was a Saturday, I believe—is that correct? A. Yes.

Q. The telegrams of April 10th, which will be discussed later? A. Yes, I did.

Q. The telegrams have reference to telegrams addressed to Robert Cummings? A. Yes.

(Testimony of Robert Speers)

Q. How many in number were there?

A. As I recall it, there were three.

Q. You know that date to be some time—

A. That was April 10th.

Q. And did you have the conversations that you set forth in your affidavit of October 21st, on the day you had those telegrams on your desk?

A. No, I did not.

Q. Approximately, then, what date would you say you had the conversation which your affidavit sets forth to be April [50] 10th?

A. I am quite sure I had a conversation on April 3rd, and then a subsequent conversation on the 5th, approximately.

Q. Is it possible that that might have been—are you positive that it was on those dates?

A. Yes; approximately on those dates, because I am sure it was over a weekend, and it would have been the previous weekend to those dates mentioned there.

Q. Directing your attention, then, to the conversation you had with Robert Cummings on April 3rd, referred to in your affidavit of October 21st as April 10th, where did that conversation take place?

A. In my office.

Q. Do you recall how he happened to be there? Did you send for him?

A. I think Bob called before he came in and asked if I would be there, and said he was coming in to talk to me.

(Testimony of Robert Speers)

Q. Do you recall whether it was morning or afternoon?

A. I believe the conversation started in the late morning and continued through the noon hour into the early or mid afternoon. It was a rather extended conversation.

Q. Did you have lunch together?

A. No, we didn't eat lunch.

Q. Will you relate the entire conversation you had with him at that time?

Mr. Roth: Might I state, for the purpose of the record, [51] because the court has already ruled on this matter, that I would like to enter a general objection to this line of questions, on the ground that it is incompetent, irrelevant and immaterial, that the defense set forth in the second amended answer is not properly pleaded, and does not contain all of the elements of the defense of estoppel, and therefore is not pertinent to this lawsuit. And may I ask that the objection go to all of this?

The Court: The ruling is that the objection is overruled.

Mr. Roth: And I would like to have an exception.

The Court: And I understand that plaintiff's counsel is asking whether you are prepared to stipulate that he shall be deemed to be objecting to this present line of interrogation.

Mr. Cooper: Certainly.

Mr. Roth: And that I may have an exception, without making the objections specifically to each question.

Mr. Cooper: Certainly.

(Testimony of Robert Speers)

Q. By Mr. Cooper: Will you relate the conversation of April 3rd with Mr. Cummings?

A. Yes. Mr. Cummings came into the office, and we talked of different matters, the health of our respective families, and so forth, and then he said that he had been thinking over again the question of his playing the role of "Hank" in "Fired Wife." And I asked him what his feeling in the matter was at that time, and he said that he was very [52] much troubled about playing the role, had worried about it, and naturally was seriously thinking of refusing to play the role. And I asked him what his objections were to performing the services, and he said that his principal objection was that he didn't feel that the director whom the company had selected for the picture was a suitable director for him, that is, that he felt that Mr. Lamont's qualifications were not such as to make him suitable to direct a picture in which Bob appeared. He also said that he had been troubled about appearing in any photoplay or any picture for some time, because he had been turning over in his mind the advisability or the necessity of his getting out of pictures for the duration of the war, in order to perform services for the government in the Civilian Air Patrol or the Army—I believe he mentioned both of those possibilities—and he doubted the wisdom of an actor in these war times appearing in a frivolous picture, because he thought it might subject the actor to criticism. And I said to Bob that on that particular point I thought it was debatable, because in many cases, after discussing it with people who were active on the Hollywood Victory Committee—

Q. That is what you told him?

A. Yes, that is what I told him. —which is an organization that provides entertainment for the armed

(Testimony of Robert Speers)

forces and for bond drives, etc., the Hollywood Victory Committee had been very much interested in that particular point, and [53] I thought it was debatable whether a young leading man type could appear in public, and particularly before the armed forces, without being criticized as a slacker, or something of that kind, and I had been very much interested to learn that, on the basis of honest judgment, many actors who had gone in, that there had been practically no criticism on the part of troops or public or anybody else, but the feeling seemed to be, generally, that such activity was a definite contribution to the war effort and was a very fine thing. And I brought up the further point that as far as appearing in a picture was concerned, there was a substantial feeling in favor of it in the country and in the armed forces as well.

Q. That is what you said to Bob?

A. That is what I said to Bob in answer to his point. I said that at least a lot of people felt, a good many people felt, that an actor's contribution to the war effort was to provide escapist entertainment, on the theory that it would buoy up public morale as well as the morale of the troops to see these pictures. And I said also that I disagreed on Mr. Lamont's qualifications as a director, that I felt that he was quite competent to direct the picture and do a good job. And I said, furthermore, in view of the fact that the picture in question was about to start, that it was such a late date, that it would be rather unfair to the company, that they had gone ahead with many preparations for the production of the picture, in the way of casting, and so on, [54] for him to refuse to do it at that time. And at the conclusion of the conversation Bob said

(Testimony of Robert Speers)

that he could appreciate some of my points, and, while he didn't entirely agree with me, at least he thought—well, he didn't say "think"—he said he would definitely think the matter over and let me know what his final decision would be. That, as I remember it, is approximately what was said.

Q. Do you recall in that particular conversation any discussion about his ability to perform the services in this part, notwithstanding he joined something? Was that a part of this conversation or a subsequent conversation?

A. Yes. When Bob said he was seriously thinking of entering the service for the duration, I said that, as the representative of the company, I knew I was expressing the company's opinion when I made it clear that I would not want to be put in the position of trying to dissuade him from entering the service or doing anything which he thought was his duty in time of war, because in the past the company had made that clear, that whether a man goes in the Army or whether he goes in the Navy is entirely for him to decide. However, I brought up the point that in view of the shortness of time involved, in view of the fact that the picture was about to start, I considered the question was rather academic, in that whether or not he entered the service either before or at the end of the picture didn't, it seemed to me, make any material difference to the war effort, and that, on the [55] basis of experiences which the company had had, I was quite sure that were he to sign up immediately he still would be permitted, by whatever organization he signed up with, to perform those services and then go into the service, if he wanted to.

(Testimony of Robert Speers)

Q. Now, that was the substance of the conversation?

A. Yes, sir.

Q. I think you said that he said that he would let you know?

A. He said he would think the matter over and let me know.

Q. Did you inform anybody at the studio about this conversation? A. Yes, I did.

Q. Who did you inform?

A. I spoke to Mr. Kelley.

Q. That is Daniel Kelley?

A. Dan Kelley, yes.

Q. Who else?

A. I think I spoke to Emmett Ward.

Q. Who is Emmett Ward?

A. He is a member of the contract department of the studio.

Q. For the purpose of the record, who was Dan Kelley?

A. Dan Kelley is my immediate superior, the executive at the studio in charge of all creative talent, writers, etc.
[56]

Q. In other words, it is your present recollection that you informed Dan Kelley and Emmett Ward about the substance of this conversation on or about the 3rd of April? A. That is right.

Mr. Cooper: If the court please, this would be a convenient place or time for the recess.

The Court: Very well. We will take a recess until 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock p. m. of this day, Tuesday, January 4, 1944.) [57]

AFTERNOON SESSION.

2:00 O'CLOCK.

ROBERT D. SPEERS

(Recalled.)

Direct Examination

(Continued.)

Q. By Mr. Cooper: Mr. Speers, at this morning's session we had just concluded your testimony with respect to your conversation of on or about April 3rd with the plaintiff, Robert Cummings. You stated that he told you that he would let you know, or words to that effect. That was the conversation at your office at Universal Studios. Thereafter did Robert Cummings get in touch with you in some fashion? A. Yes, he did.

Q. In what manner? A. By telephone.

Q. Where did you receive the phone call?

A. In my office.

Q. At Universal Studio? A. That is right.

Q. Did you recognize his voice? A. Yes.

Q. Approximately how long after the conversation of on or about April 3rd was this second conversation?

A. It was two days later, on April 5th.

Q. Is that the conversation you referred to in your affidavit filed in this court as the conversation of April [58] 12th? A. Yes.

Q. In your affidavit did you give the entire conversation? Did you set forth the entire conversation in your affidavit of October 21st?

Mr. Roth: Objected to as immaterial and not cross examination.

(Testimony of Robert Speers)

Mr. Cooper: You can anticipate cross examination by asking the witness if he has been convicted of an offense, and in that way soften the blow, so to speak.

The Court: I will let him proceed.

Q. By Mr. Cooper: In your affidavit of October 21st, did you give the entire conversation, relate the entire conversation? A. No, I did not.

Q. Did you at some time prior to the preparation of your affidavit and some time after this conversation of April 5th make a memorandum of that conversation?

A. Yes, I did.

Q. In what form was that memorandum?

A. Well, it was a memorandum to Mr. Muhl, which I dictated to my secretary.

Q. Did you sign it? A. Yes.

Q. When did you dictate that memorandum?

A. I checked the matter, and it was on July 2nd. [59]

Q. That you dictated this memorandum?

A. Yes.

Q. And in that memorandum did you make the same mistake with reference to the dates?

A. Yes, I did.

Q. Being April 10th and April 12th?

A. That is right.

Q. Have you used that memorandum to refresh your recollection as to the entire conversation that took place on or about April 5th? A. Yes, I have.

Q. Will you relate the entire conversation that you had with Robert Cummings on or about April 5, 1943?

Mr. Roth: If the court please, we object to that on the ground that it is apparent from the questions of counsel

(Testimony of Robert Speers)

and the answers of the witness thereto, that he is about to give a conversation based upon refreshing his recollection from a memorandum made three months after the conversation took place.

Mr. Cooper: May I ask a further question?

The Court: Yes.

Q. By Mr. Cooper: At the time you dictated this memorandum were the facts fresh in your memory? Did you have an independent recollection?

A. Reasonably, yes; it was reasonably fresh in my memory. [60]

The Court: I am inclined to permit interrogation by opposing counsel at this time, to inquire further as to the reasonableness of the statement to the effect that the witness had the matter approximately accurately in his mind.

Mr. Cooper: May I state, Mr. Roth, that I have that memorandum, should you care to refer to it.

Mr. Roth: May we have the permission of the court to look at it before—

The Court: Yes.

Mr. Cooper: Here is the file.

Mr. Roth: Yes. May I rise? It is hard to see the witness from there, your Honor.

The Court: Yes; that is all right.

Mr. Cooper: Pardon me. Is it improper to rise in the court? I have done that myself.

The Court: There is a physical difficulty when one is sitting so far away from the witness, because of the obstruction which is created by this device here.

(Testimony of Robert Speers)

Mr. Cooper: My point is, I have risen to question the witness myself, which I do as a matter of habit. Maybe the court would prefer that I sit.

The Court: Sometimes it is disturbing, on cross examination, to the witness.

Cross-Examination

Q. By Mr. Roth: Mr. Speers, at the time you made this memorandum which I have in my hand, and to which you have [61] referred in your direct examination, did you have any pencil notes from which you made it?

A. No, I did not.

Q. Then you made the memo entirely from memory?

A. With the aid of questions that I asked my secretary as to approximately when Mr. Cummings came in, and I believe I asked her if she had any recollection of him calling and making an appointment, and she said she had; but mostly from memory, from my recollection of the conversation.

Q. Do you keep in your office any data which shows the times and dates upon which telephone calls are made?

A. Not a permanent record, no, but she often makes notations on her daily calendar of an appointment which will be coming up in a day or so.

Q. When you spoke to your secretary did she submit to your inspection any data that she had made of a telephone conversation?

A. To the best of my knowledge, she did not. She merely said that she recalled Robert Cummings calling me.

Q. Did you ask her on what date the call came in?

A. Yes, I did.

(Testimony of Robert Speers)

Q. What did she say to you?

A. I don't recall.

Q. What else did you ask your secretary before you dictated this memorandum to which you have alluded?

A. The only other question I can recall asking was [62] along the same general lines, asking her if she recalled Mr. Cummings coming in one day and calling me a day or two thereafter.

Q. What did she say?

A. She said that she did.

Q. You have referred to this memorandum as having been made on July 2nd.

A. That is right.

Q. Is there any date on the memorandum itself which indicates that it was made at that time?

A. There doesn't seem to be.

Q. How do you know that it was made on July 2nd?

A. Because my secretary consulted her stenographic notebook, which carried the notation as to when the dictation was taken.

Q. Then you are testifying not only from your memory, but from your secretary's memory and notes?

A. That is correct.

Q. You referred in your direct examination this morning to certain data that you had referred to in order to straighten out your error as to dates?

A. Yes.

Q. Where is that data?

A. I don't know where it is physically at the moment, but it was at that time—

(Testimony of Robert Speers)

Mr. Cooper: He wasn't sure without consulting the file [63] that I just handed Mr. Roth. I direct your attention, Mr. Roth, to a letter in the file.

Q. By Mr. Roth: Your counsel has directed my attention to a letter dated April 9, 1943, on the stationery of Universal Pictures Company, Inc. It is an unsigned letter, and appears to be addressed to Mr. Robert Cummings, care of Oscar R. Cummins, Esq., California Bank Building, Beverly Hills, California. Is that the data you referred to this morning from which you refreshed your recollection, and upon which you changed the date set forth in the affidavit? A. It is.

Q. Is that the only data you referred to?

A. No. I checked on the date of the telegrams sent Mr. Cummings.

Q. Did you have a record of the date of those telegrams in your office?

A. I did not, in my office, no.

Q. Where did you find that record?

A. In the contract files.

Q. Who asked you to make this check?

A. Edward Muhl.

Q. When did the request come to you to make this check?

A. Approximately two or three weeks ago.

Q. Then when did you dictate this memorandum which I showed you, and which you have testified was dictated on July 2nd? [64]

A. I dictated it on July 2nd.

(Testimony of Robert Speers)

Q. Did you dictate the memorandum before the request was made upon you to give a report on the conversation?

A. Oh, no. The request for the memorandum to which you refer, of July 2nd, was made by Edward Muhl prior to July 2nd.

Q. When?

A. I would imagine, although I don't remember exactly, that it was within two or three weeks after April 2nd or 3rd, the time Robert Cummings did not report.

Q. So that there will be no confusion on that subject, the notices apparently fixed the date for his reporting as April 12th?

A. Yes.

Q. Do you mean two or three weeks after April 12th?

A. Yes, I do.

Q. Two or three weeks after April 12th would bring you to the early part of May, so the request from Mr. Muhl to make a memorandum of your conversation came to you the early part of May?

A. That is right.

Q. But you didn't make the memorandum until July 2nd?

A. That is correct.

Q. What did you do between the early part of May and July 2nd, the date upon which you testify you dictated this memorandum? [65]

A. That is the point. I did a great many things. I was busy and forgot about the memorandum, and Mr. Muhl would remind me of it, and I would say that I was going to do it, and then didn't do it. It was dilatory on my part.

(Testimony of Robert Speers)

Q. When you finally got down to getting the data for the memorandum which you dictated, what did you do in respect of getting the data for that memorandum?

A. As I stated, I searched my own mind as to the facts, and talked to my secretary as to her recollection about Mr. Cummings' visit and telephone call.

Q. Did you do anything else?

A. No, I don't believe I did. I don't recall doing anything else.

Q. Is there anything that appears on the memorandum itself to which your counsel has referred which indicates that that was written on July 2nd?

Mr. Cooper: I will stipulate that there is not, counsel.

Q. By Mr. Roth: Did you, at the time you had the first conversation with Mr. Cummings, which you now fix as April 3rd, make any pencil memorandum of what was said between the two of you? A. No.

The Court: Did you make any notes of any kind?

A. No.

Q. By Mr. Roth: Did you dictate to your secretary, or to anyone in your office, anything as to what occurred between [66] you? A. No, I did not.

Q. And other than looking at this letter, to which I have directed your attention, which is dated April 9, 1943, was there any other data that you had before you upon which you based the summary of the conversation as set forth in the memorandum that you testify you prepared on July 2nd?

A. I am sorry. I didn't follow the question.

Q. Perhaps it is too involved. I will reframe it. When you dictated the memorandum which you testify was dictated on July 2nd, 1943, did you have before you

(Testimony of Robert Speers)

any memorandum or data of any kind other than this letter, unsigned, which is dated April 9, 1943, and to which I have already directed your attention?

A. Is it proper for me to—I did not mean to say that I consulted this letter at the time I dictated the memorandum, because I did not.

Q. You mean the memorandum of July 2nd?

A. Yes. I consulted the letter after I had written the memorandum, fairly recently, two or three weeks ago.

The Court: That is the letter of April 9th?

A. That is right.

Q. By Mr. Roth: Either I am confused, or counsel or the witness is confused, because I asked you that question, and counsel then handed me the file and turned to the letter of April 9th, and stated that that was the data to which you [67] referred. That is wrong, is it?

A. Yes, it is. I referred to data, but not at the time I wrote this memorandum, or I wouldn't have put—

Q. Then, as a matter of fact, at the time of the conversation that you had with your secretary, when you dictated the memorandum, that you say was dictated on July 2nd, 1943, you had no data or memorandum before you?

A. That is correct.

The Court: Unless counsel wishes to pursue the matter for some other reason, I am inclined to think the objection is well taken.

Mr. Cooper: May I ask a couple of other questions?

The Court: Yes.

(Testimony of Robert Speers)

Redirect Examination

Q. By Mr. Cooper: When you dictated the memorandum or letter of July 2nd, were the facts of the phone conversation fresh in your mind?

A. Yes, they were.

Q. And you set them forth and dictated that to your stenographer?

A. That is right.

Q. The things you consulted your secretary about, I understood from your answers, were with respect to dates?

A. Yes.

Q. At the present time do you have a general recollection of the general conversation of April 5th? [68]

A. I do.

Q. Have you also refreshed your memory as to the conversation, as to the specific details, from the memorandum of July 2nd?

A. I have.

Mr. Roth: If the court please, there is nothing we could do or would want to do to prevent this witness from testifying to any conversation he had with the plaintiff, Robert Cummings, on April 5th. The sole point of our objection is that the witness must testify from his recollection, and not from any purported memoranda that he made of that conversation later.

The Court: That is the purpose of the ruling.

Mr. Roth: Yes. Now, of course, after the witness has already testified that he has refreshed his recollection, there is no way of differentiating between whether he is testifying to it from his original recollection of the conversation, or from his recollection of the conversation, plus such assistance as he may have obtained from reading and dictating and re-reading this memorandum, but we haven't any objection to the question being asked and

(Testimony of Robert Speers)

answered, insofar as it is possible for the witness to answer it from his own recollection. The memo is not admissible.

Q. By Mr. Cooper: Will you relate the conversation you had with Mr. Cummings on April 5th?

A. Mr. Cummings called me on the telephone at my office [69] on that date, and, referring to our previous conversation in my office, said that he had thought over the matter which we had discussed, which was whether or not he would appear in the part of "Hank" in the picture "Fired Wife," and said that he had thought it over very seriously, and had come to the conclusion, rather reluctantly, that he would not do the picture. I said that in view of our long conversation before, in which we had gone into all the details and all the arguments both ways, that I considered that there was no point at this stage of the game in my trying to rehash those arguments again, and that if that was his final decision there wasn't much that I could do about it. And he said that was the case, that he had thought it over very seriously, and had finally come to that definite conclusion, that he would not do the picture, because he didn't think it was right for him to do it, and that, furthermore, he had decided that he would devote one hundred percent of his time to the war effort, and had signed up for the duration. And he stated further that he supposed that everyone at the studio would think he was a son-of-a-bitch for coming to that conclusion, and, if so, he was sorry, and he hoped that I personally wouldn't feel that way about it. And I think that ended the conversation.

Q. Now going back again to the question of fixing the date, do you recall an occasion some three or four

(Testimony of Robert Speers)

weeks ago when Mr. Cooper, your present counsel, came to see you? [70] A. Yes, I do.

Q. And whether you notified Ed Muhl, and at which conversation Ed Muhl and Ben Erlich were also present?

Mr. Roth: We object to counsel testifying. He has asked many leading questions, and he is testifying, in effect, now. It is not a matter of proper direct examination.

The Court: May I ask the reporter to read the question?

(Question read by the reporter.)

The Court: What is the purpose of the present line of interrogation?

Mr. Cooper: It was not proper on voir dire, may it please the court, but I want to show the circumstances under which it was called to his attention.

The Court: You mean the error as to the dates?

Mr. Cooper: That is correct. Of course, ordinarily these matters would be first developed on cross examination, and then further inquired into on redirect, but here we have a somewhat unusual situation, where the witness has signed an affidavit, in which he has sworn to assertions which are now part of his direct examination, and, anticipating that the statements made in the affidavit would confront him, he is endeavoring now to give his explanation of how those mistakes arose. I think he should be allowed to do that.

Q. By Mr. Cooper: Did someone in that conversation call your attention to a question of dates? [71]

A. Yes.

Q. Who was that someone? A. You.

(Testimony of Robert Speers)

Q. Was it then that you began this check which you have heretofore testified to, with respect to dates?

A. Yes, it was.

Q. Following this conversation on or about April 5th, did you convey the information that you had obtained from Mr. Cummings to someone in the studio?

A. Yes, I did.

Q. To whom?

Mr. Roth: We object to that as immaterial. The time and date are long after the notice of May 29th.

The Court: This apparently seeks to throw light on how the error in dates was ascertained and sought to be corrected.

Mr. Cooper: No, your Honor. This now is to show the knowledge of the officers of the corporation and the matters upon which they based their telegram of April 10th.

The Court: May we have the pending question?

(Question read by the reporter.)

Mr. Roth: That is objected to.

The Court: It would appear that in the performance of his duties the witness might well communicate with others in the studio who had some duty to discharge with reference to this contract.

Mr. Cooper: That is the sole purpose. [72]

The Court: I think he should be allowed to answer.

Q. By Mr. Cooper: To whom did you convey that information? A. Dan Kelley.

(Testimony of Robert Speers)

Q. To whom else? A. To—

Q. You identified Dan Kelley earlier in the examination, I believe?

A. Yes. To Emmett Ward.

Q. In what department is Emmett Ward?

A. The contract department.

Q. Do you recall how soon thereafter?

A. Immediately after concluding my telephone conversation with Mr. Cummings, I went into Mr. Kelley's office and told him of the conversation.

Q. Did you tell him the entire conversation?

A. Yes.

Q. Thereafter, and on or about the 10th of April, did you have some telegrams on your desk?

A. Yes.

Mr. Cooper: At this point, may it please the court, with the permission of the court and counsel, I would like to call a representative of the Western Union Telegraph Company, who has the telegrams, so that I can show them to the witness.

The Court: You merely want to temporarily withdraw the witness?

Mr. Cooper: Yes, if your Honor please. Any objection? [73]

Mr. Roth: None at all.

Mr. Cooper: Mr. Meaney, will you please come forward.

J. E. MEANEY,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please, for the record.

A. J. E. Meaney.

Direct Examination

Q. By Mr. Cooper: Mr. Meaney, what is your business or occupation?

A. Commercial manager of the Western Union Telegraph Company.

Q. Pursuant to a subpoena, have you brought with you certain telegrams? A. I have.

Q. Three in number? A. Yes.

Q. Dated April 10, 1943? A. They are.

Q. Each addressed to Robert Cummings at different addresses? A. They are.

Q. Will you hand me those telegrams, please?

A. Yes.

Mr. Cooper: I first show the telegrams to counsel. [74]

Mr. Roth: Thank you.

Q. By Mr. Cooper: Were those telegrams left at the Western Union Telegraph Company office in the County of Los Angeles? A. They were.

Q. On what day? A. April 10, 1943.

Mr. Roth: Pardon me. May I ask the witness whether he is testifying from recollection or from notes.

A. I am testifying from the telegrams.

Mr. Roth: All right.

Q. By Mr. Cooper: Does the Universal Pictures Corporation have an arrangement for credit with the Western Union? A. They have.

Mr. Cooper: You may cross examine.

Mr. Roth: I have no questions.

Mr. Cooper: That is all. At this time I offer the telegrams in evidence as Defendant's Exhibit B for identification only, at the moment. Thank you, Mr. Meaney.

The Court: Is there any purpose in giving the three telegrams more than one designation?

Mr. Cooper: I know of none, no. They are identical in the message. The addresses are different, may it please the court.

The Court: They will become Defendant's Exhibit B.

[DEFENDANT'S EXHIBIT NO. "B"]

[WESTERN UNION TELEGRAM]

1943 APR 10 PM 6 17

APRIL 10, 1943

MR. ROBERT CUMMINGS (Report Dly)

14111 SHERMAN WAY

VAN NUYS, CALIFORNIA

YOU ARE HEREBY INSTRUCTED TO REPORT TO US AT OUR STUDIO AT UNIVERSAL CITY, CALIFORNIA, AT THE OFFICE OF MR. DAN KELLEY, AT TEN O'CLOCK MONDAY MORNING, APRIL 12, 1943, FOR THE RENDITION OF YOUR SERVICES UNDER YOUR CONTRACT OF EMPLOYMENT WITH US DATED NOVEMBER 21, 1938, AS HERETOFORE AMENDED AND EXTENDED, IN CONNECTION WITH THE PORTRAYAL OF A ROLE IN OUR PHOTOPLAY NOW ENTITLED "FIRED WIFE" AND/OR THE RENDITION OF SUCH OTHER SERVICES AS WE MAY REQUIRE UNDER SAID CONTRACT, AS AMENDED AND EXTENDED.

UNIVERSAL PICTURES COMPANY, INC.

By EDWARD MUHL

ASSISTANT SECRETARY [244]

(Defendant's Exhibit B)

1943 APR 10 PM 6 11

APRIL 10, 1943

MR. ROBERT CUMMINGS (Report Dely)
CARE OSCAR CUMMINS
527 CALIFORNIA BANK BUILDING
BEVERLY HILLS, CALIFORNIA

YOU ARE HEREBY INSTRUCTED TO REPORT TO US AT OUR STUDIO AT UNIVERSAL CITY, CALIFORNIA, AT THE OFFICE OF MR. DAN KELLEY, AT TEN O'CLOCK MONDAY MORNING, APRIL 12, 1943, FOR THE RENDITION OF YOUR SERVICES UNDER YOUR CONTRACT OF EMPLOYMENT WITH US DATED NOVEMBER 21, 1938, AS HERETOFORE AMENDED AND EXTENDED; IN CONNECTION WITH THE PORTRAYAL OF A ROLE IN OUR PHOTOPLAY NOW ENTITLED "FIRED WIFE" AND/OR THE RENDITION OF SUCH OTHER SERVICES AS WE MAY REQUIRE UNDER SAID CONTRACT, AS AMENDED AND EXTENDED.

UNIVERSAL PICTURES COMPANY, INC.
BY EDWARD MUHL
ASSISTANT SECRETARY

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Defendant's Exhibit No. "B" for Identification. Date: Jan. 4, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk.
[245]

Mr. Cooper: Mr. Speers, please. [75]

ROBERT SPEERS

(Recalled.)

Redirect Examination

(Continued.)

Q. By Mr. Cooper: Now, on April 10, 1943, did you have before you these three telegrams, Defendant's Exhibit B for identification?

A. Yes, I did. My handwriting is on the bottom of one of them.

Q. Those identical telegrams? A. Yes.

Q. Did someone at the studio leave those telegrams with you? A. Yes.

Q. Who left those telegrams with you?

A. Emmett Ward.

Q. He is a member of the contract department?

A. That is right.

Q. Did you hold those telegrams on your desk for some period of time on April 10, 1943?

A. Yes, I did.

Q. For how long a period of time?

A. I think it was about three hours or four hours.

Q. Until what time of that afternoon?

A. My recollection is that it was 4:30 or 5:00 o'clock.

Q. And were you waiting for some reason?

A. Yes.

Q. Waiting for what? [76]

A. I had reason to think, to hope that either Robert Cummings or Oscar Cummins would call me, saying that the—

(Testimony of Robert Speers)

Q. Never mind that. You didn't hear from them?

A. That is right.

Q. Did you deliver those telegrams to someone?

A. Yes.

Q. To whom did you deliver the telegrams?

A. To my secretary, Miss Clay.

Q. Who is seated here in the courtroom?

A. That is right.

Q. Before April 3, 1943, had you seen Robert Cummings in the uniform of the Civilian Air Patrol?

A. Yes, I had.

Mr. Cooper: You may cross examine.

Recross-Examination

Q. By Mr. Roth: Mr. Speers, how long had it been prior to April 3rd that you had seen Mr. Cummings in the uniform of the Civilian Air Patrol?

A. You mean how long a period had I seen him in it, or how long before that?

Q. I mean how long a period prior to that time.

A. I think it was about four or five months before.

Q. You knew for a period of at least four or five months in 1943, that Mr. Cummings was in the Civilian Air Patrol? A. Yes.

Q. And you knew also that the fact that he was in the [77] Civilian Air Patrol wouldn't interfere with his duties at Universal, didn't you? A. Yes, sir.

Q. On April 3, 1943, when you had your first conversation with Mr. Cummings, when you finished that conversation did you call on Mr. Dan Kelley and tell him about the conversation?

A. That is the 2nd or 3rd?

(Testimony of Robert Speers)

Q. Yes. A. I believe I did.

Q. Did you call on Mr. Ed. Muhl and tell him about the conversation?

A. I don't recall that, although I may have.

Q. Did you call on Mr. Ward after that first conversation and tell him about the conversation?

A. I don't recall talking to him about it either.

Q. The only one you recall talking to about the conversation of April 3rd was Mr. Dan Kelley?

A. That is right, the first conversation.

Q. When you had the second conversation, that is, the one over the telephone, did you again call on Mr. Kelley and tell him about the conversation?

A. Yes, I did.

Q. Did you call on Mr. Muhl and tell him about the conversation?

A. No. Mr. Kelley, in his office, tried to get Mr. [78] Muhl on the telephone, and instead got Mr. Ward, who came into the office, at which time I told him of my conversation with Mr. Cummings.

The Court: May I interrupt. When you say "Mr. Cummings," because of the similarity in names, I suggest that you indicate whether you are referring to Mr. Robert Cummings or to Mr. Oscar Cummins.

A. Mr. Robert Cummings, in this case.

Q. By Mr. Roth: After your conversation with Dan Kelley on April 5th, I understand that Mr. Ward was called in and appeared? A. Yes.

Q. And when he appeared did you repeat to Mr. Ward what you had already told Mr. Kelley?

A. Yes, I did.

(Testimony of Robert Speers)

Q. So the only two people you spoke to about the conversation you had with Mr. Cummings were with Mr. Kelley on the 3rd, after the first conversation, and with Mr. Kelley and Mr. Ward on the 5th?

A. Those were the only people I spoke to within five minutes after I finished that conversation. I subsequently spoke to a number of people.

Q. Who were they?

A. I discussed the matter with Mr. Muhl. I discussed it with my associate in my office, Miss Elrod. I discussed it with my wife. I discussed it with Mr. Jack Gross. I [79] discussed it with Mr. Ernest Fesser, or Mr. Mike Fesser, and with Mr. Ernest Pagano, the writers on the picture, and I discussed it with Mr. Lamont, the director of the picture, and John Joseph, the publicity director of the studio, and, I am sure, with a number of other people, whose names escape me at the moment.

The Court: It is not clear to me, when you use the expression "I discussed it," whether you are referring to the first conversation, had on April 3rd at the studio with the plaintiff, or the later conversation over the telephone on April 5th.

A. As a practical matter, your Honor, in all these discussions I am sure I referred to both conversations, but specifically I was referring to the second conversation of April 5th, in which Mr. Cummings said that he had decided not to do the picture, Mr. Robert Cummings.

Q. By Mr. Roth: Are all the people whose names you have mentioned, other than your wife, people who were employed by the defendant Universal, and who were in some way connected with the picture "Fired Wife"?

A. Yes, either directly or indirectly connected with it.

(Testimony of Robert Speers)

Q. I have a copy—it may be a duplicate original, Mr. Speers—of the affidavit which you signed on the 21st day of October, 1943. Will you look at the last page and tell me whether or not that is your signature?

A. Yes, that is my signature. [80]

Q. When you signed this affidavit who asked you for the facts upon which the affidavit is based?

A. Mr. Ben Erlich.

Q. When Mr. Ben Erlich asked you for those facts was anyone else present?

A. I believe not.

Q. You knew at the time you gave the facts to Mr. Erlich upon which this affidavit is predicated—and I am referring to the affidavit which is dated October 21, 1943—you knew that there was a lawsuit pending, did you not, between Robert Cummings and Universal Pictures Company, Inc.?

A. I believe I did, although I don't know that anyone specifically said it was pending. It was a matter of common knowledge that there was a likelihood of a lawsuit, that in all probability there would be one, but I can't say honestly that I had any official knowledge of the existence of a lawsuit. I assumed that there was one.

Q. Could you say that you had positive knowledge that there was one?

A. No, I don't believe I can.

Q. Mr. Speers, don't you read the affidavits you sign?

A. Yes, sir.

Q. Let me call your attention to the caption of the affidavit, which is entitled In The United States District Court, in the action of Robert Cummings vs. Universal Pictures Company, Inc. Didn't that indicate to you or

(Testimony of Robert Speers)

give you [81] positive knowledge that there was a lawsuit pending?

Mr. Cooper: That is calling for a conclusion of the witness. I don't want to quibble, but the witness said he assumed there was one. The mere fact that it was entitled in the court and cause might not indicate that the suit had already been filed.

Mr. Roth: That is quite possible. This is a question of credibility and a question of what the witness was doing at the time he made the affidavit, because the question of credibility is oftentimes a close one, and I think it is fair to go into the witness' exact knowledge.

Mr. Cooper: I have no objection to that, may it please the court.

The Court: I think the form of the question needs to be revised.

Q. By Mr. Roth: At the time you signed the affidavit, Mr. Speers, did you read the first page thereof?

A. Yes, I did.

Q. And you noticed that it was entitled In The District Court of the United States, Southern District of California, in the case of Robert Cummings vs. Universal Pictures Company, Inc.?

A. Yes.

Q. Did you know at that time that Universal was asking for a temporary restraining order to prevent Robert Cummings from appearing on the radio for the Lux Theatre of the Air? [82]

A. I am sure that I did, and it was a matter of knowledge to me. I can't swear on the stand that at that moment I knew it. It was explained to me by Mr. Erlich at one time or another. Whether it was at that precise time I am not sure.

(Testimony of Robert Speers)

Q. At the time you made your statement to Mr. Erlich you wanted to state to Mr. Erlich all the facts that you had any knowledge about as to your conversation with Mr. Cummings, didn't you? A. Yes.

Q. You knew at the time when you were talking to Mr. Erlich, at the time this affidavit was signed, October 21, 1943, that you had already dictated the memorandum which you testified was dictated on July 2, 1943, didn't you? A. That is right.

Q. Why didn't you refer to that memorandum before you signed this affidavit?

A. I don't know. I didn't.

Q. Is there anything in this affidavit, Mr. Speers, any averment, any suggestion, any statement, in which you say that on April 5th, when Robert Cummings called you back over the telephone, he told you substantially or in effect that he had decided to devote one hundred percent of his time to the war effort and had signed up for the duration? Is there anything in that affidavit, substantially or in effect, which contains that statement? [83]

A. I note here a sentence that says also that he was thinking of signing up for service for the duration of the war.

Q. I direct your attention, Mr. Speers, to the fact that that sentence refers to a conversation that you had on April 10th. I will read it to you: "On April 10, 1943, at Universal City, California, in a conversation with Cummings in my office, Cummings told me that he was considering refusing to render his services in said photoplay for the principal reason that the director selected for said photoplay did not meet with his approval and also because he was thinking of signing up with the

(Testimony of Robert Speers)

Service for the duration of the war." I understand you corrected the date in that affidavit from October 10th to October 3rd.

Mr. Cooper: You don't mean October.

Q. By Mr. Roth: I mean April 10th to April 3rd?

A. That is right.

Q. So the conversation to which that subject matter refers is in reality the conversation that took place on April 3rd? A. That is right.

Q. Is there anything in that affidavit which refers to a conversation on April 12th, which you have now corrected to April 5th, in which you say, substantially or in effect, that Mr. Cummings called you up and told you that he had decided not to do the picture, because he had made up his [83] mind that he was going to devote one hundred percent of his time to the war effort, and was going to sign up for the duration of the war?

A. That is a reference to the conversation—

Q. You may read it.

A. It says: "On April 12, 1943, I had a telephone conversation with Cummings relative to the same subject matter as is hereinabove set forth, and Cummings stated to me that he had decided not to render the services requested of him by Universal and would not appear at the studios of Universal to portray the said role herein referred to. Cummings did refuse to report and did not appear to render the said services for the role assigned

(Testimony of Robert Speers)

him, and it therefore became necessary to assign another actor to replace Cummings and this was done. Cummings has failed and refused, and continues to fail and refuse, to report for work at the studios of Universal."

Q. Now, Mr. Speers, you testified that when you gave the data for that affidavit to Mr. Erlich, you didn't refer to the memorandum which you testified was dictated on July 2nd, but you have also testified that after you had this conversation with Mr. Robert Cummings on April 3rd, and after you had your conversation with Robert Cummings on April 5th, you repeated that conversation not only to Mr. Dan Kelley, and not only to Mr. Ward, but to at least half a dozen other people, whose names you have mentioned, so the [84] substance of that conversation was rather fresh in your mind, wasn't it?

A. Yes, reasonably so.

Q. Would you say that you made a fair statement of the context and substance of that conversation when you signed that affidavit?

A. Apparently I overlooked a detail involving Robert Cummings; I overlooked part of the conversation in making the affidavit, in which Robert Cummings told me that he had signed up for the duration of the war and was going to devote one hundred percent of his time to the war effort.

Q. Do you call that a detail? A. Yes.

Q. It was a sufficiently important detail, wasn't it, Mr. Speers, for the legal department of Universal to

(Testimony of Robert Speers)

frame a notice predicated upon that alleged statement, which they never sent? Isn't that true?

Mr. Cooper: I object, your Honor.

The Court: That is arguing with the witness.

Mr. Cooper: I will withdraw it, however, if the court will permit me to go into it.

The Court: I am inclined to think that we had better let the lawyers argue the law, rather than have the witnesses argue it.

Mr. Roth: All right, your Honor. I am going to be bound by the court's ruling. That is all. [85]

Redirect Examination

Q. By Mr. Cooper: Incidentally, some time after April 5th did you, in fact, obtain somebody else to portray the role of "Hank"? A. Yes, we did.

Mr. Roth: Is that part of the redirect examination?

Mr. Cooper: That may be true, counsel.

The Court: I will let him answer it.

Mr. Cooper: This may not be, technically, redirect, but I ask permission to reopen for this question.

Q. By Mr. Cooper: On April 10th when you sent or caused to be sent the telegrams of April 10th, did you have any conversation with Robert Cummings on that day? A. No, I did not.

Mr. Cooper: I think that is all.

Mr. Roth: That is all. No further questions.

Mr. Cooper: Miss Clay. [86]

JOSEPHINE CLAY,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name for the record, please.

A. Miss Josephine Clay.

Direct Examination

Q. By Mr. Cooper: Miss Clay, what is your business or occupation?

A. Secretary to Mr. Speers.

Q. You are employed by Universal Pictures Company, Inc.?

A. That is right.

Q. And you have been engaged in that capacity for approximately how long?

A. Well, with Mr. Speers about a year.

Q. And with Universal for how long?

A. Two years.

Q. Were you at Universal Studio on April 10, 1943?

A. I was.

Q. Did you have occasion on that day to receive some telegrams from Bob Speers?

A. Yes, I did.

Q. I show you Defendant's Exhibit No. B, being three telegrams in number, and ask you if you recognize those as telegrams, in form and in substance, that you received from him at that time.

A. That is right. They are. [87]

Q. Did you receive some instructions from him at that time, from Mr. Speers?

A. Yes.

Q. What instructions did you receive from him?

A. We were to wait until 5:30 in the afternoon for a phone call from Mr. Oscar Cummins, and when we didn't receive the phone call—

Mr. Roth: I move that that be stricken.

(Testimony of Josephine Clay)

The Court: Let the answer go out.

Mr. Cooper: I will withdraw that.

Q. By Mr. Cooper: Did he instruct you to deliver the telegrams somewhere?

A. Yes, to the Western Union office on my way home.

Q. Do you have a teletype machine at Universal?

A. Yes.

Q. Which teletypes the messages you give to the Western Union? A. Yes.

Q. Was the girl who operated that teletype machine there that Saturday afternoon? A. No.

Q. Did you take those three telegrams, Defendant's Exhibit B for identification, somewhere?

A. Yes, I did.

Q. Where did you deliver them?

A. At the Beverly Hills office of the Western Union.
[88]

Q. And you left them there with the agent at Western Union Telegraph Company at that place? A. Yes.

Mr. Cooper: You may cross examine.

Mr. Roth: No questions.

Mr. Cooper: I now at this time offer the telegrams in evidence, may it please the court, as Defendant's Exhibit B.

Mr. Roth: To which we object, your Honor, on the ground that no proper foundation has been laid. All the evidence shows is that the telegrams were composed and delivered by some agent of Universal to the telegraph office. There is no evidence whatsoever that the tele-

grams were ever transmitted or delivered to the plaintiff or his agent.

Mr. Cooper: We are relying, if your Honor please, upon the presumption of delivery, and the paragraph in the contract, which is made a part of the complaint, which reads as follows: Paragraph 15 of the contract provides: "All notices which the producer is required or may desire to serve upon the artist under or in connection with this agreement may be served by addressing the same to the artist at such address as may be designated from time to time in writing by the artist."

And, eliminating some of the immaterial provisions of the paragraph:

"In any case, by depositing the same so addressed, postage prepaid, in the United States mail, or by sending the [89] same so addressed by telegraph or cable, or, at its option, the producer may deliver the same to the artist personally, either in writing or, unless otherwise specified herein, orally. If the producer elect to mail such notice or to send the same by telegraph or cable, then the date of mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice."

Then I also call your Honor's attention to the case of *Union Construction Co. vs. Western Union Telegraph Company*, 163 California, 298, at page 306, and also the case of *Eppinger vs. Scott*, 112 Cal. 369, at page 371, referred to in our memorandum of points and authorities.

The Court: Those cases hold that an inference is deductible?

Mr. Cooper: It is a rebuttable presumption, I believe.

The Court: What is the page in your memorandum?

Mr. Cooper: Pages 30 and 31, may it please the court, but I particularly am resting on the provisions of the contract.

Mr. Roth: All the provisions of the contract do, those provisions read by Mr. Cooper, they say this, that the date of delivery to the telegraph office shall be the date of the notice, shall be the date of the service of the notice. The date of the service of the notice—that doesn't mean that it is the date of the receipt of the notice. It means [90] this, that if the plaintiff got the notice five days after that date, the date of service would be the date of the delivery to the telegraph office.

Mr. Cooper: That is not my conception of it.

Mr. Roth: That is our argument on it.

Mr. Cooper: That will be for the court to determine.

Mr. Roth: They had an official from the Western Union on the stand. All these people testified to was that they received those wires in their office on that date, the date the wires bear. The officer didn't testify that those wires were transmitted by hand or by telephone or in any other way.

The Court: In the first of the two cases cited by defense counsel, namely, *Union Construction Co. vs. Western Union Telegraph Company*, 163 Cal. 298, the quotation from page 306 includes the following

statement, on page 31, beginning about line 19 of the brief:

“If a letter or telegram is duly addressed, prepaid and delivered in the post-office receptacle or to the telegraph company, there is a disputable presumption of fact, arising from the almost invariable result, that it has been transmitted and delivered in regular course to the person addressed.” Citing *Eppinger v. Scott*; Code of Civil Procedure, Section 1963, subdivision 24, and several textbooks on evidence.

Then the quotation from the decision in *Eppinger v. Scott*, reported in 112 Cal. 369, the quotation being found at pages 371 and 372 of the decision, states: “The rule has long [91] been settled and is made statutory in this State (Code Civ. Proc., sec. 1963, subd. 24), ‘that a letter duly directed and mailed was received in the regular course of the mail.’ The same rule has been extended to telegrams.”

Then follow a number of citations. Wouldn't you agree that that would appear to fix the foundation to introduce these telegrams in evidence?

Mr. Roth: I am inclined to think so, your Honor, but I would like to make this further point. If it is a presumption that attaches, then I think the official of the telegraph company who testified should be retained here, because I will want to ask him whether they were actually delivered, and, if delivered, whether delivered by hand or telephone, if he knows, because, in respect to a notice of this kind, the question now is as to whether these messages were delivered physically or phoned in. I would like to know.

Mr. Cooper: If your Honor please, I didn't excuse him. But I will be very happy to get him on the telephone.

Mr. Roth: Perhaps we can dispense with that, because at a prior discussion I had with counsel on this subject, I advised counsel that we have all the notices of Universal except these wires, and counsel informed me that he had, that as far as he was able to find out, the wires had been delivered to the telegraph office and phoned, one to Robert Cummings' residence in Van Nuys, and one to the office of [92] Oscar Cummins, at a certain address. If that is the fact, I am willing to stipulate to that fact.

Mr. Cooper: If your Honor please, I did phone counsel and notify him of that fact, and that was the reason I suggested this in my direct examination, figuring that counsel would desire to bring it out on cross examination. But it is a fact, rather than call this man— Will you please repeat your offered stipulation?

Mr. Roth: In lieu of recalling Mr. Meaney, I offer to stipulate at this time, not that it is a fact, but that Mr. Meaney would testify that the wires, which are Defendant's Exhibit B now for identification, were telephoned to the residence of Mr. Robert Cummings in Van Nuys, and to an address for Mr. Oscar Cummins some place in Los Angeles or Beverly Hills. I think you have the data.

Mr. Cooper: I have that data, counsel, and I certainly have no disposition to ask him to come back. I will be very happy to stipulate as to what the facts are.

Mr. Roth: With this further limitation, that the people who received those telephonic messages were neither Robert Cummings nor Oscar Cummins.

Mr. Cooper: I will accept the stipulation, based upon the information that I have in my files, from the telegraph company, which I assume is true.

Mr. Roth: We could do that at a recess.

Mr. Cooper: This might be a good time to take the [93] afternoon recess.

Mr. Roth: For that purpose, then, I am withdrawing my objection.

The Court: Very well, then. We will take a ten-minute recess.

(Short recess.)

Mr. Roth: If your Honor please, we now offer to stipulate that, in lieu of recalling Mr. Meaney from the Western Union for the purpose of cross examination, that, if recalled and cross examined, Mr. Meaney would testify that on April 12, 1943, by teletype, they sent a wire to Universal Pictures Company, Inc.—by “they” I mean Western Union Telegraph Company—to Edward Muhl, Assistant Secretary, which reads as follows: “YOUR TELEGRAM TO ROBERT CUMMINS (REPORT DLY) CARE OSCAR CUMMINS 527 CALIFORNIA BANK BLDG OUT OF CITY ADDRESS UNKNOWN WAS FONED TO HIS SISTERINLAW AT 1050 AM 11TH WHO WILL RELAY MSG TO HIM.”

Then the other one: “WIRE FILED BY MR EDWARD MUHL SECTY APR 10 TO ROBERT CUMMINGS CR OSCAR CUMMINS 527 CALIFORNIA BANK BLDG BEVERLYHILLS CALIF CLOSED UNTIL AM 8511 SUNSET BLVD CLOSED UNTIL AM 14111 SHERMAN WAY VANNUYS OUT OF CITY ADDRESS UNKNOWN WE FONED TO MRS OSCAR CUMMINS WHO WILL RELAY MESSAGE.”

And we offer in evidence as Plaintiff's Exhibit 1 this telegram.

[PLAINTIFF'S EXHIBIT NO. 1]

[WESTERN UNION TELEGRAM]

SJ126 35 DL COLLECT--==BV BEVERLY HILLS
CALIF APR 12 1943 556P

UNIVERSAL PICTURES CO INC==

=EDWARD MUHL ASSISTANT SECRETARY=

:YOUR TELEGRAM TO ROBERT CUMMINS
(REPORT DLY) CARE OSCAR CUMMINS 527
CALIFORNIA BANK BLDG OUT OF CITY AD-
DRESS UNKNOWN WAS FONED TO HIS SIS-
TERINLAW AT 1050 AM 11TH WHO WILL RE-
LAY MSG TO HIM=

:WESTERN UNION TEL CO.

.609 PM. [235]

SB24 SVC=FAU=

:WIRE FILED BY MR EDWARD MUHL SECTY
APR 10 TO ROBERT CUMMINGS CR OSCAR
CUMMINS 527 CALIFORNIA BANK BLDG BEV-
ERLY HILLS CALIF CLASED UNTIL AM 8511
SUNSET BLVD CLOSED UNTIL AM 14111 SHER-
MAN WAY VAN NUYS OUT OF CITY ADDRESS
UNKNOWN WE FONED TO MRS OSCAR CUM-
MINS WHO WILL RELAY MESSAGE--

=LOSA APR 11 1943. (944 AM) ..

[Endorsed]: Case No. 3242-H-Civ. Cummings vs.
Universal. Pltf's. No. 1 in Evidence. Date: Jan. 4, 1944.
Clerk, U. S. District Court, Sou. Dist. of Calif. L.
Wayne Thomas, Deputy Clerk. [236]

Mr. Cooper: I have no objection to stipulating that [94] Mr. Meaney would so testify under cross examination, and, although I don't think the telegram should necessarily be admitted into evidence, I have no objection to it.

The Court: Very well.

Mr. Cooper: Call Mr. Kelley.

The Court: Just a moment before he takes the stand.

Mr. Cooper: Yes, your Honor.

The Court: Now, Mr. Reporter, will you read the stipulation?

(Stipulation read by the reporter.)

Mr. Cooper: The message was received at Universal on the teletype machine.

The Court: Received in the form of Plaintiff's Exhibit 1 at Universal.

Mr. Cooper: Yes, your Honor.

The Court: Now, the next witness.

Mr. Cooper: Daniel Kelley. [95]

DANIEL KELLEY,

called as a witness on behalf of defendant, being first duly sworn; testified as follows:

The Clerk: State your name for the record.

A. Dan Kelley.

Direct Examination

Q. By Mr. Cooper: Mr. Kelley, what is your business or profession?

A. I am executive in charge of talent, writers, directors and producers, of Universal Pictures Company, Inc.

(Testimony of Daniel Kelley)

Q. And you were such during the months of April and May of this year? A. Yes, sir.

Q. And you have been such for approximately how long, Mr. Kelley?

A. I would say three or four years.

Q. Generally speaking, what are your duties?

A. In charge of creative talent.

Q. Do you know the plaintiff, Robert Cummings?

A. I do.

Q. And he, of course, is under contract with your studio? A. Yes, sir.

Q. And you had conversations with him from time to time?

Mr. Roth: Just a moment. That question should be answered yes or no, and it calls for a legal conclusion.
[96]

Mr. Cooper: I will withdraw it.

The Court: Let it go out.

Q. By Mr. Cooper: At least he was working there at your studio, wasn't he? A. He was.

Q. And portraying some parts in some photoplays?

A. Yes.

Q. Some time before the 10th day of April, 1943, the date these telegrams were sent, and between the 5th of April and the 10th of April, did Mr. Robert Speers, your casting director, report to you some information that he had received from Robert Cummings? A. Yes.

Q. What did he tell you?

Mr. Roth: Objected to as hearsay and self-serving.

Mr. Cooper: If your Honor please, it is not offered for the purpose of proving the truth of the conversations, but to show that the message was delivered to him, and that he acted upon it, and how he acted upon it.

(Testimony of Daniel Kelley)

The Court: I am inclined to think that, for the latter purpose, assuming that the evidence will ultimately show a chain of events supporting the allegations of the second amendment to the answer, that for such purpose this line of testimony appears to be admissible.

Mr. Roth: Without arguing the question, and even with that thought in mind, your Honor, for the witness merely to [97] testify that he had a conversation with Robert Speers, and merely on what subject matter, and what he did after that conversation—

The Court: I am inclined to think you are in error on that point.

Mr. Roth: I believe that it is entirely proper, may it please the court, for the purpose of showing what information he, as an executive of the studio, received, and how he relied and acted upon it. Will you do this, in order to simplify the thing, because I don't want to throw technical impediments in the way of the defense, that, subject to its being connected up, and subject to my objection that it is incompetent, irrelevant and immaterial and hearsay, that it may be received, and at some later stage in the proceeding, if not connected up, I may make a motion to strike?

The Court: Very well.

Q. By Mr. Cooper: What information did you receive from Bob Speers?

A. He came in and told me that Mr. Cummings had called him and told him that he was not going to play the leading part—that he had just had a telephone call from Mr. Cummings, and that he was not going to play "Hank" in the picture. He said, quoting Mr. Speers' words, "I know I am a no good son-of-a-bitch, but I can't help it. I signed up for the duration for exclusive services with the Civilian Air [98] Patrol, and I will not do the part."

(Testimony of Daniel Kelley)

Q. Did you call someone into your office at that time, or was someone called in?

A. I called for Eddie Muhl, I think. I called the Legal Department to find out what we could do.

Q. Do you recall who came in in response to your call to the Legal Department?

A. I am not definite. I don't know whether it was Eddie Muhl or Bud Ward.

Q. And was the conversation in substance repeated at that time? A. Yes.

Q. Did you suggest that they do something about it?

A. I did. I said I thought we should wire Mr. Cummings, to make it legal, and to find out whether it was definitely true that he was not going to be able to do any more pictures for the duration.

Q. Now, some time thereafter did you learn that wires had been sent?

A. Yes, I knew that wires had been sent.

Q. Had you seen the wires before they went out?

A. I did not. I don't think I did. I don't remember.

Q. For what purpose did you want Robert Cummings at your office on April 12, 1943?

A. I wanted to find out whether it was definitely true—

Mr. Roth: Objected to as an attempt to vary the terms [99] of a written instrument. There was a notice sent on April 10th which purports to set that up.

The Court: I think I should allow this.

Mr. Roth: I make the further objection, on the further ground that it is self-serving and is asking the witness to testify to something that was in his mind and was conveyed to nobody, and certainly not to this plaintiff.

(Testimony of Daniel Kelley)

The Court: While I would be inclined to say that testimony of this character is exceedingly weak, in other words, without corroboration, it could hardly be regarded as persuasive, I gather from some of the argument that has previously been urged here, that there may be a theory upon which the defendant is entitled to be heard respecting this particular aspect of the case. I am not altogether clear about that. However, while we have the witness on the stand I think we ought to hear this part of his story.

Q. By Mr. Cooper: For what purpose did you want Robert Cummings at your office on April 12th?

A. To find out personally from him whether it was objection to the part or whether it was definitely because of going into the Civil Air Patrol, and, if it was to go into the Civil Air Service, whether he, as had been stated to me, was going to be out for the duration and not able to do any more pictures.

Q. And you wanted to have such a discussion with him?

A. Yes, because I had been told that he was tied up [100] and doing no more pictures for the duration. That was what Mr. Speers came into my office and said, that he was not going to do that part. We were scheduled to start on Monday, and we had to postpone the picture until the following Thursday, to start, because we had nobody to go into it.

Q. Were you scheduled to start on April 12th?

A. That is correct, or whatever the date was. Whatever that Monday was, we didn't start until the following Thursday.

Mr. Roth: The 10th would be what?

A. We didn't start the picture until the 15th.

(Testimony of Daniel Kelley)

Q. By Mr. Cooper: Was it necessary for you, in making plans, to know with respect to his availability?

Mr. Roth: That is objected to as calling for the pure conclusion of the witness.

Mr. Cooper: I don't think so, if your Honor please.

The Court: As I understand it, there is no controversy raised as to the right of the defendant to substitute another player. This seems to be dealing with a matter about which there is no controversy.

Mr. Cooper: No, if your Honor please. This is with respect to the portion of the telegrams wherein they said, "You are asked to report for such other services as we may require."

The Court: Then may I have the pending question?

(Question read by the reporter.) [101]

The Court: Of course, that question is in the nature of a shortcut.

Mr. Cooper: That is right.

Mr. Roth: I will withdraw my former objection.

Mr. Cooper: I will ask this, then:

Q. By Mr. Cooper: In your wire of April 10th, you asked him to come in to portray the role of "Hank" and/or to perform such other services as you required?

A. Yes, sir.

Q. And had Robert Cummings come in to portray the role of "Hank," did you have any other services for him to perform at that time?

A. If he had come in to portray the role, no.

Q. Had he reported to you and said that he wouldn't portray the role of "Hank," for what other services did you want him at your office?

(Testimony of Daniel Kelley)

Mr. Roth: Objected to as having been asked and answered.

The Court: Was there any reason, in addition to what you have already told us?

A. Only that we would have to plan for some other personality for the rest of our pictures that we had figured for Mr. Cummings.

Q. By Mr. Cooper: Now, when Mr. Cummings did not appear on April 12th, what was your belief by virtue of, first, what you were told by Bob Speers and, second, his failure to report on April 12th? [102]

Mr. Roth: May I have that question, Mr. Reporter?
(Question read by the reporter.)

Mr. Roth: That is objected to as incompetent, irrelevant and immaterial, and not proper direct examination, and self-serving, and calling for opinion evidence.

The Court: Yes; it calls for a state of mind. The witness, of course, can be asked as to what course of conduct he followed. It becomes a matter of inference in argument as to whether there was any connection between what was told him and the course of conduct the witness pursued or the others pursued in the studio.

Mr. Cooper: I will put it the other way, then.

The Court: In other words, while in a criminal case the accused may testify about the subject of what was in his mind, particularly in the field of intent, it is exceedingly rare that that is open to inquiry in a civil suit.

Mr. Cooper: Except this, may it please the court, that the state of mind of this soulless corporation, as counsel would say, could only act through its officers.

Mr. Roth: Soulless and mercenary.

Mr. Cooper: All right. That can only be shown through its agents and employees, acting within the scope

(Testimony of Daniel Kelley)

of their authority. What his state of mind was is important to the defense of estoppel, it seems to me—what the corporation was led to believe as a result of the conduct and the specific statements of Robert Cummings. [103]

The Court: It seems to me that there is some confusion here. The defense, naturally, would be allowed to testify as to the conditions prevailing as far as they pertained to this plaintiff, including plans that were either then completed or in process of formulation, and what, if anything, the company did, because if the matter rested purely in a state of mind I don't think it would constitute a defense.

Mr. Cooper: I think your Honor is correct in that, but I wanted to start with that and wind up with the other.

The Court: Well, a state of mind is in the nature of a conclusion, and perhaps a justification for a particular course of action being taken, or, on the other hand, omitted. So I think the pending question is open to the criticism raised.

Mr. Cooper: May I note an exception and make an offer of proof at this time, may it please the court? I will offer to prove by this witness, in response to the question asked, that he believed that Robert Cummings had intended to devote one hundred percent of his time to the Civil Air Patrol, and therefore would not perform any further services under his contract, and acted accordingly. That, in substance, would be the testimony of this witness in that regard, and I offer to prove that by the witness.

(Testimony of Daniel Kelley)

Mr. Roth: To which we object, upon the ground that it is incompetent, irrelevant and immaterial, and self-serving, and testimony as to a state of mind. [104]

The Court: The ruling is that the defense will be allowed to show the facts and circumstances and conditions, as far as they existed, with respect to the plaintiff, and what, if any, action was taken or action was omitted following the disclosure of the matters to which the witness either has testified or will testify.

Mr. Cooper: I will note an exception to the ruling and proceed. I take it that that is a denial of the offer of proof?

The Court: No. I think you have combined in your offer of proof some matters which are admissible and some which are not, and for that reason I make the ruling.

Mr. Cooper: Very well.

Q. By Mr. Cooper: Now, thereafter, that is, after April 12th, when Robert Cummings did not report at your office at the studio, what plans did you make with reference to Robert Cummings?

The Witness: Shall I answer?

The Court: Yes.

A. I took it for granted from that moment on, when he did not appear on April 12th, that he was definitely in the Civil Air Patrol for the duration.

Mr. Roth: I move that the answer be stricken, on the ground that it is not an answer to the question.

The Court: I think it should go out.

Q. By Mr. Cooper: Did you give any instructions to the [105] contract department or discuss with the contract department what should be done with respect to Cum-

(Testimony of Daniel Kelley)

nings' contract, or did you leave that with the contract department; do you recall?

A. I asked the contract department if it was legally right for us to suspend Mr. Cummings for the duration, and they said yes.

Q. Did you give them any instructions to proceed on that basis? A. To suspend him, yes.

The Court: May I interrupt, to make sure that I understand this answer?

Mr. Cooper: Yes, your Honor.

The Court: You used the expression "duration." The duration of what?

A. Of the war, the time he was in the service. That was the expression he used. I will answer that by saying that we have a number of contracts suspended for the duration, that we have a number of artists on suspension for the duration at the studio at the present time, because they are in the armed services.

Mr. Roth: We object to the voluntary statement of the witness.

The Court: Let it go out.

Q. By Mr. Cooper: As a result of the information that you had received from Bob Speers and the fact that Robert [106] Cummings did not appear on April 12th, in pursuance of your telegram of April 10th, did you cause his compensation to be stopped likewise?

A. Yes.

The Court: May I have that question?

(Question read by the reporter.)

Mr. Roth: We would like to have an objection before the answer to the question, on the ground that it asks the witness to state a conclusion. We haven't any objection to the witness stating that after the telegram of

(Testimony of Daniel Kelley)

April 10th was sent, and after Robert Cummings failed to appear on April 12th, he went ahead and suspended him. It makes this witness decide what may be an issue in the case.

The Court: While I think there is merit in that criticism, I am not going to accept this witness' version of what the legal decision should have been, or whether there is any legal justification for what was done.

Mr. Roth: With that statement by the court, I withdraw my objection.

Q. By Mr. Cooper: Did you know at any time after April 10, 1943, that Robert Cummings had demanded payment of salary from the studio after that time, other than the notice that you received terminating the contract on May 29th? Let me withdraw that question and put it this way. Between April 10, 1943, the date when the telegram was sent,—do you have that date in mind? [107]

A. Yes.

Q. And May 29th, which was the date you received the notice from Robert Cummings, complaining that the contract was terminated for non-payment of salary, did you know or did anyone inform you, directly or indirectly, that he was holding himself available to the studio?

A. No.

Q. Does any member of the paymaster's office or any member of the cashier's office have the authority to order payment of compensation?

A. No.

Q. Who at Universal had authority to order payment of compensation to Robert Cummings? I will withdraw that question. Assuming that an actor like Robert Cummings were under contract, and receiving a salary of \$1500 a week, and he was suspended for some reason,

(Testimony of Daniel Kelley)

who has the authority to order him put back on the payroll?

Mr. Roth: I don't think this witness is qualified to answer that question. It may or may not be the best evidence. I presume these matters of authority are covered by the proceedings of the Board of Directors. However, I don't care to interpose dilatory objections, but, subject to this, I would be willing to let the witness answer, if Mr. Cooper will furnish me with copies of the resolutions, so that I can compare them with the answers this witness may give and stipulate that if the answers are not in accordance [108] with such authority as the resolutions delegate, that the answers may be corrected, I am willing to waive any objection I may have at this time.

Mr. Cooper: I don't know of any resolution of the board of directors covering the particular authority of all employees in a large organization of this kind. However, I can assure you that we will check up on it.

Mr. Roth: I don't know whether Mr. Kelley can testify as to what the authority is of each particular officer.

The Court: Let me interrupt to say this: On the present showing, there is merit in the objection.

Mr. Cooper: That would go to its weight, may it please the court, rather than to its admissibility, would it not?

The Court: Oh, to more than its weight.

Mr. Roth: Furthermore, it is immaterial, in view of the stipulation made by counsel this morning, when he stated to the court that the check wasn't ready and that the defendant didn't intend that it be ready.

(Testimony of Daniel Kelley)

Mr. Cooper: That is true. However, in your memorandum of points and authorities you also claim that that was a demand on his part, showing that he was ready, able and willing to perform. Didn't you make that contention in there? Maybe we can do it this way. I will withdraw the last question.

Q. By Mr. Cooper: Do you have authority to order payment of salary to an actor of Robert Cummings' standing, under [109] contract, after he is put on suspension?

A. Yes.

Q. Who else at the studio, if you know, has similar authority?

Mr. Roth: I object to that as not the best evidence.

The Court: I am inclined to think that the objection is good, unless you are prepared to enter into some stipulation whereby you will check up on the proof.

Mr. Cooper: May it please the court, I will do that. Out of an abundance of caution, I will check into the resolutions of the board of directors. However, I do not believe that the records of Universal Pictures Company, Inc., or any other similar organization, will define the respective duties of employees in the organization. It is true that they will define the duties of the president, vice-president, secretary and treasurer, but as to lesser employees, that is left to the person in charge of the studio, the persons down the line acting under his direction and authority.

The Court: I am inclined to think, for example, that that proof would be admissible, showing the practice that has been followed over an extended period of time on the subject.

Mr. Cooper: Well, I think that is all. You may cross examine.

(Testimony of Daniel Kelley)

Cross-Examination

Q. By Mr. Roth: Mr. Kelley, I think you have testified that Mr. Robert Speers came into your office and told you [110] about a telephone conversation he had with Robert Cummings? A. Yes, sir.

Q. Can you fix the date when Mr. Speers came into your office, the approximate date?

A. I don't know the exact date. I know it was just a couple of days, three or four days, before we were to start the picture, because I said, "What are we going to do?"

Q. Three or four days before you were to start the picture, and you testified that the picture was to start on April 12th? A. Yes.

Q. Three or four days before that would be the 9th or the 8th?

A. The 9th or 10th, somewhere.

Q. Prior to the time that Mr. Robert Speers came into your office and told you about his telephone conversation with Robert Cummings, had he been in your office to report any other conversation that he had had?

A. He had been in once and said that Robert Cummings had talked—I don't remember whether it was Robert or Oscar Cummins,—but there was some difficulty on the director; he didn't think he was of a caliber who should direct Mr. Cummings. Whether that was from Oscar Cummins or Bob Cummings I do not remember, but either one of the two.

Q. And this conversation which you have now detailed, was that prior to the— [111]

A. It was prior.

(Testimony of Daniel Kelley)

Q. Was it a day prior or a week prior?

A. I can't tell you exactly. I would say it was a few days prior.

Q. Was anyone in your office when he transmitted that conversation to you?

A. I do not remember.

Q. About the director? A. I do not remember.

Q. Did he say anything else to you other than the fact that either Robert Cummings or Oscar Cummins had told him that the director was not satisfactory?

A. Only that he didn't think the picture, that with that director set-up, it wasn't an important picture for Robert Cummings.

Q. Did he also tell you—and by "he," I mean Mr. Speers—did he tell you that Oscar or Robert, whoever it happened to be, had also said that Robert was seriously thinking of going into the Civil Air Patrol?

A. I don't remember whether he did or not at that time.

Q. But a few days afterwards he came into your office and told you that he had had a telephone conversation with Robert Cummings, and that Robert Cummings had said, in effect, that he was not going to play the part of "Hank," and that he had signed up for the duration of the war with the Civil Air Patrol or some other military body, and that [112] he, Robert Cummings, knew that he was something of a son-of-a-bitch, but there was nothing he could do about it? Is that substantially what

(Testimony of Daniel Kelley)

Mr. Robert Speers reported to you after that telephone conversation?

A. Substantially, yes, that he was going to sign up for exclusive services in whatever service it was and not do any more pictures for the duration.

Q. And by "duration" you mean the duration of the war?

A. I don't know that he meant that.

Q. Did Mr. Robert Speers say "for the duration of the war"? A. He said "for the duration."

Q. And you accepted that as meaning for the duration of the war?

A. That was the reason we immediately sent the telegram.

Q. Was Mr. Ward in the office at the time Mr. Robert Speers transmitted that conversation to you?

A. I don't remember.

Q. Do you know whether Mr. Ward came in subsequently?

A. Either Mr. Ward or Mr. Muhl were in, and we talked about sending the wire to have him report, to find out whether he was going to do the part, and whether he was going to be in for the duration.

Q. Who came in—Mr. Ward or Mr. Muhl?

A. I said I don't remember.

Q. You don't remember? [113]

A. I don't remember.

(Testimony of Daniel Kelley)

Q. When either one of the two, when Mr. Ward or Mr. Muhl came in, was Mr. Speers still in the room with you?

A. I couldn't make a definite statement to that effect either. I don't remember.

Q. Do you know whether Mr. Speers reiterated the telephone conversation in your presence to Mr. Ward or Mr. Muhl, whoever it was that came in later?

A. He may have, but I wouldn't say that he did.

Q. In any event, after you had spoken to Mr. Ward or Mr. Muhl, you directed the sending of the wire of April 10th; is that correct?

A. That is correct.

Q. Were you told on or about April 12th that the wire of April 10th had never been delivered?

A. No.

Mr. Roth: May I have Plaintiff's Exhibit 1?

Mr. Cooper: Just a minute, if your Honor please. I object to that legal conclusion of counsel in the last question, and move that it be stricken, for that reason.

Mr. Roth: What is that?

Mr. Cooper: I contend that the wire was in fact delivered. That is a legal conclusion on counsel's part, that the wire was not delivered.

Mr. Roth: But, irrespective of that, I have a right to ask this witness whether or not this wire of April 12th, the [114] wire from Western Union to Universal Pictures Company, Inc., was ever shown to Mr. Kelley.

Mr. Cooper: Oh, I haven't any objection to that question. I beg counsel's pardon. May we have the previous question read, though, so we will get our record straight.

The Court: Very well.

(Record read by the reporter.)

(Testimony of Daniel Kelley)

Mr. Cooper: I move to strike the question and the answer, on the ground that it calls for a legal conclusion.

Q. By Mr. Roth: I show you, Mr. Kelley, a wire, which is marked Plaintiff's Exhibit 1 in evidence, from Western Union to Universal Pictures Company, Inc., Edward Muhl, Assistant Secretary, and ask you if that wire was shown to you on April 12th?

A. On April 12th?

Q. Or at any time thereafter, or on or about April 12th.

A. If it was, I don't remember.

Q. Did Mr. Muhl, or any person, inform you, on or about April 12th, that he had received a wire from Western Union Telegraph Company, the effect of which was that Universal's wire of April 10th had not been physically delivered to Robert Cummings or Oscar Cummins, but had, in fact, been telephoned to Mrs. Oscar Cummins?

A. It is very hazy, but I think there was something said about delivering it to Mrs. Cummins, yes, that part. Whether it was in a telegram or whether they told me [115] personally, I can't tell you.

Q. You just testified that you didn't see the telegram?

A. I didn't say that. I don't remember seeing the telegram.

Q. Then you couldn't have gotten the information from the telegram, and it must have come from some person?

A. That is right.

Q. Who was the person?

A. I can't positively say. It was somebody in the legal department, but I don't remember whether it was Mr. Muhl or Mr. Ward, who usually handled these things.

Q. Then you did know, on or about April 12th, that the telegram of April 10th, which Universal had sent to

(Testimony of Daniel Kelley)

Robert Cummings, and to Robert Cummings, care of Oscar Cummins, had not been physically delivered to either Robert Cummings or Oscar Cummins?

A. To his wife.

Q. Did you understand that it had been physically delivered to his wife?

A. That is what I understood, yes.

Q. Did someone tell you that?

A. That is right.

Q. You don't know who that someone was?

A. No, I don't.

Q. Is this the first time you have seen, or that you can remember seeing this Plaintiff's Exhibit 1? [116]

A. That I can remember, yes.

Q. After you received this information that it had been physically delivered to Mrs. Oscar Cummins, and by "it" I mean Universal's telegram of April 10th, did you do anything about it?

The Witness: Will you read that again?

(Question read by the reporter.)

A. No. I knew—I thought we were in the clear by it being delivered to his wife.

Mr. Roth: I move that the answer of the witness after "No," go out.

The Court: It may go out. After the word "No" the answer will be stricken.

Q. By Mr. Roth: Did you at any time after April 10, 1943, to and including June 1, 1943, communicate with Robert Cummings in any way? A. No.

Q. Did you between those dates, to-wit, April 10, 1943, and June 1, 1943, communicate with Oscar Cummins in any way? A. No.

(Testimony of Daniel Kelley)

Q. Isn't it a fact that sometime between April 10, 1943, and prior to the conclusion of the picture "Fired Wife," you were called up by someone at Metro-Goldwyn-Mayer, who told you that if Universal would take Robert Cummings off suspension, they could persuade Robert Cummings to do a picture for them? [117]

A. What is that question again?

Mr. Roth: Will you read it, Mr. Reporter?

(Question read by the reporter.)

A. No.

Q. No one—

A. Not the way you put that question, no.

Q. Let me see if I can put it so that I can get an answer. Did you receive any information from any source prior to the conclusion of the picture "Fired Wife," that if Universal lifted the suspension on Robert Cummings, M-G-M or some other studio could persuade Robert Cummings to do a picture for them?

A. You say if we lifted the suspension?

Q. Yes. A. No.

Q. Did you receive any message from any person or studio during the time that Universal was making the picture "Fired Wife" that such other person or studio could persuade Robert Cummings to do a picture for them? A. No.

Q. Did you have a discussion with any other producer of pictures on the subject of Robert Cummings, during the time that Universal was making the picture "Fired Wife"?

A. I don't believe it, not while we were making "Fired Wife."

(Testimony of Daniel Kelley)

Q. Did you have such a discussion or conversation after [118] you had completed "Fired Wife"?

A. After June 1st?

Q. Not after June 1st, but after—

A. Yes.

Q. You say after June 1st?

A. I think it was after June 1st.

Q. Did you say that there was any such conversation prior to June 1st? A. I don't believe so.

Q. Who did you have the conversation with after June 1st?

A. You want to know definitely the man's name?

Q. Yes. A. Mr. Benny Thau.

Q. Would you say that was after June 1st?

A. I would say so. I don't know the exact date.

Q. What was the conversation?

A. Only that Mr. Oscar Cummins was over to see him and said he was no longer under contract to Universal, and he wanted to tip us off.

Q. Then Mr. Thau did not ask you—

A. He said, "If I can help, I will be very glad to."

Q. Is that the whole conversation?

A. As I remember it. He said, "If I can help, I will be glad to help, and I think I can."

Q. Did you have any further conversation with Mr. Thau [119] after that?

A. I think there were two or three conversations along that matter, and I said I thought we were very capable of handling our own contract matters without asking for help from some other studio.

Q. In any other conversation with Mr. Thau was anything said about M-G-M being able to persuade Robert

(Testimony of Daniel Kelley)

Cummings to do a picture for them if the suspension were lifted by Universal?

A. If I remember correctly, he said, "I can help you. If you need our help, I will be very glad to do that for you." I don't think he said anything about lifting any suspension, no.

Q. Your answer, then, is no? A. No.

Q. After April 10, 1943, did you have any further conversation with Mr. Speers, Mr. Muhl or Mr. Ward in respect of the intentions of Robert Cummings not to perform services for Universal by reason of the fact that he was going to enlist in the Civil Air Patrol or some other military arm for the duration of the war?

A. That is correct.

Q. You did have? A. Only at that time.

Q. Did you have any conversation with any of those gentlemen after that time? [120]

A. After we sent the wire of April 10th?

Q. Yes. A. No, not to my knowledge.

Q. But at that time, at least, the matter was discussed fully with Mr. Speers, Mr. Ward and Mr. Muhl?

A. I don't know whether it was with Mr. Speers. It was with Mr. Ward and Mr. Muhl.

Q. Mr. Speers is the man that gave you the information originally?

A. That he wouldn't work in the picture, yes. Whether I told him or not, I don't remember, that we had suspended him for the duration.

Q. Didn't Mr. Speers tell you that Robert Cummings was not going to do the picture "Fired Wife"?

A. That is correct.

(Testimony of Daniel Kelley)

Q. Because he was signing up for the duration of the war with the Civil Air Patrol, and he wasn't going to make any more pictures for the duration?

A. That is right.

Q. Because he was doing that. That is the first information you had? A. That is right.

Q. That is the one and only time you discussed it with Robert Speers?

A. No, I wouldn't say that. That was prior to April 10th. [121]

Q. After April 10th did you discuss it with him?

A. No. After he didn't report on April 12th, Mr. Cummings, as far as I was concerned, he was on suspension, and we considered him on suspension for the duration. There was no more discussion, to my knowledge, after that.

Q. Did you read the notice of April 10th?

A. No, I didn't. I just told them, the legal department, to send him the telegram, and the legal department phrased it and sent it to Mr. Speers.

Q. Is Mr. Muhl in charge of the legal department?

A. He is.

Q. Is he a lawyer?

A. He is in charge of the legal department at the studio, under Loeb & Loeb, who are the attorneys for the studio, as I understand.

Q. Mr. Muhl himself is not an attorney?

A. No, sir.

Q. But he is in charge of the legal department at the studio?

A. At the studio, under the attorneys Loeb & Loeb.

(Testimony of Daniel Kelley)

Q. Mr. Kelley, on or about, or exactly on the first day of November, 1943, you signed an affidavit in this case. Do you remember signing one? A. Yes.

Q. Who did you give the information to upon which the affidavit was predicated? [122]

A. Mr. Erlich.

Q. Was the affidavit drafted by Mr. Erlich, or was it drafted by Loeb & Loeb? A. I don't know.

Q. I show you, Mr. Kelley, that affidavit of yours, which consists of approximately seven pages, and ask you to point out to the court, at any place in that affidavit, any reference to the conversation that you had with Mr. Speers or with Mr. Muhl or with Mr. Ward, in which Mr. Speers said to you, substantially or in effect, that Mr. Robert Cummings had called him up on the telephone, and that he was not going to play the part of "Hank" in "Fired Wife," that he had signed up with the CAP for the duration of the war, and he was not going to make any further pictures?

Mr. Cooper: To which I object as immaterial, in view of the nature of Mr. Kelley's affidavit. I will stipulate, as a matter of fact, that there is no reference at all in the affidavit to it, and I object to the question.

Mr. Roth: I will accept the stipulation that there is nothing in the affidavit with reference to that conversation, but the effect of it I am perfectly willing to argue.

The Court: What is the date of that affidavit?

The Witness: November 1, 1943.

Mr. Roth: November 1, 1943.

Q. By Mr. Roth: When you received the information, on or about April 12th, from some person whose name you cannot [123] remember, that the telegram of

(Testimony of Daniel Kelley)

April 10th, Plaintiff's Exhibit 1, had not been physically delivered to Robert Cummings or to Oscar Cummins, but that it had been physically delivered to Mrs. Oscar Cummins, did you make any effort to check up after April 12th and find out whether Robert Cummings had actually signed up for the duration of the war with any branch of the military services?

A. I did not. I though he and his wife were good friends.

Q. Mrs. Oscar Cummins, for your enlightenment.

A. Robert Cummings—my understanding was that it was Mrs. Robert Cummings.

Q. I thought I was rather clear and specific.

A. I thought it was Mrs. Robert Cummings.

Q. It is your testimony that you were told that it was delivered physically to Mrs. Oscar Cummins.

A. Yes; I understood it was Mrs. Bob Cummings. I may have misunderstood, but that is what I understood, that it was Mrs. Robert Cummings.

Q. You understood that the telegram of April 10th had been physically delivered to Mrs. Robert Cummings?

A. That is right.

Q. Correcting your previous testimony, then, and assuming that that was your understanding, did you, after April 12th, when you knew that Robert Cummings had not reported at the studio, do anything to check up and [124] investigate, for the purpose of finding out whether Robert Cummings had actually signed up with any branch of the armed forces of the United States for the duration of the war? A. No.

Q. Did you do anything about it?

A. I asked the legal department if we were clear on our contract, and they said yes.

(Testimony of Daniel Kelley)

Q. Did you do anything other than that?

A. No.

Q. Who in the legal department did you ask, and who said yes? A. Mr. Muhl.

Mr. Roth: That is all.

Mr. Cooper: I would like to ask one or two questions as on direct examination.

Redirect Examination

Q. By Mr. Cooper: Was it your desire at all times to use the services of Robert Cummings?

A. Yes.

Q. Did you consider the services of Robert Cummings valuable or otherwise?

A. We considered him a personality that was valuable.

Q. Were you at all times ready and willing to pay him his compensation, provided he reported to the studio?

Mr. Roth: Objected to as incompetent, irrelevant and immaterial, no part of the issue in this case, and asking the [125] witness to decide a question of law.

The Court: I think it calls for a legal conclusion. In other words, the defense is entitled to bring out all of the facts showing the course of conduct followed by the employer, and from that, of course, appropriate conclusions may be drawn.

Mr. Cooper: Very well, if your Honor please. I think that is all, Mr. Kelley. Does your Honor care to continue? We have some other witnesses.

The Court: I think we will resume in the morning at 10:00 o'clock.

(Whereupon an adjournment was taken until 10:00 o'clock a. m. the following day, Wednesday, January 5, 1944.) [126]

Los Angeles, California, Wednesday, January 5, 1944;
10:00 A. M.

(Parties present as before.)

The Court: You may proceed.

Mr. Cooper: With the court's permission, I should like to recall Bob Speers as on direct examination.

ROBERT SPEERS,

a witness heretofore duly sworn on behalf of defendant,
upon being recalled, testified as follows:

Direct Examination

Q. By Mr. Cooper: Mr. Speers, while you were on the witness stand yesterday you testified that on April 10th you had the three telegrams dated April 10th on your desk, and you waited for a period of some hours before you ordered them sent to the telegraph company. Now some time after April 5th, and before April 10th, did you have a conversation with Oscar Cummins on the telephone? A. Yes, I did.

Q. Do you recall what date that was?

A. No, I don't recall exactly. It was, I believe, either later in the day of April 5th, the day on which I spoke to Bob Cummings on the telephone, or the following day. It was within a day or two of that conversation.

Q. Did you call him or did he call you?

A. He called me. [127]

Q. At your office? A. Yes.

Q. At the studio? A. Yes.

Q. Did you recognize his voice? A. Yes, sir.

Q. Had you had business dealings with him for a period of time? A. Yes.

Q. You had talked with him on the telephone before?

A. Yes.

(Testimony of Robert Speers)

Q. Will you relate that conversation?

A. Oscar said that he had been advised by Bob of Bob's decision regarding the picture, and said he was going to have another talk with Bob, and he thought there was a possibility that after talking it over with him, with Bob, Bob might change his mind and decide to do the picture after all.

Q. What else did he say?

A. I think that is about the substance of it. I was just going to say that we had many times in the past discussed this situation, Oscar and Bob and I.

Q. Before April 5th? A. Yes.

Q. And before April 3rd? A. That is right.

Q. That is, with respect to his doing that part? [128]

A. Yes.

Q. Was anything said at that conversation as to you communicating with Oscar Cummins or his further communicating with you?

A. My recollection is that he said he would let me know.

Q. Was that the reason you waited until that late hour before sending the telegrams?

A. Yes. I talked the matter over with Bud Ward when the telegrams were prepared.

Mr. Roth: I object to that, if your Honor please.

The Court: Let that go out.

Mr. Cooper: You may cross examine.

Mr. Roth: No cross examination.

Mr. Cooper: That is all. Ed Muhl, please.

The Court: Will you hold the witness for a moment?

Mr. Cooper: Yes, your Honor.

The Court: Very well. [129]

EDWARD MUHL,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Edward Muhl.

Direct Examination

Q. By Mr. Cooper: Mr. Muhl, what is your business or occupation?

A. The motion picture business.

Q. And in what capacity? With whom are you employed, or by whom are you employed?

A. Universal Pictures Company, Inc.

Q. How long have you been employed by Universal?

A. Since 1927.

Q. In what capacity are you employed at the present time?

A. I am assistant secretary of the corporation, in charge of the contract department.

Q. What, generally, are the duties of the contract department?

Mr. Roth: Objected to as immaterial.

The Court: He might state his duties.

Q. By Mr. Cooper: You are the head of the contract department? A. Yes, sir.

Q. What are your duties as head of the contract [130] department?

A. We have custody of all contracts and assist in the formation of all contracts and their preparation, in connection with studio business.

Q. Do you keep records of suspensions?

A. Yes, sir.

Q. Do you order suspensions? A. Yes.

(Testimony of Edward Muhl)

Q. Do you order the exercise of options upon notice from somebody else? A. Yes.

Q. Do you have power and authority to reinstate a person who has been suspended?

Mr. Roth: I object to that, if your Honor please.

The Court: I think the question in that form is open to criticism. The witness can state the practice followed for any extended period.

Q. By Mr. Cooper: What was the practice at Universal Pictures Company, Inc., with respect to reinstating an actor who had been placed on suspension?

A. After the expiration of the condition which causes the suspension, we order the person reinstated on the payroll for the salary to be paid.

Q. Who would you notify?

A. Notify Harold Brewster, assistant treasurer and controller, his assistant, the office manager, and the pay-[131] master.

Q. Who was the paymaster?

A. Ben Steinberg.

Q. What was the practice with respect to disputes over salary?

The Court: May I interrupt to ask if you will have the witness indicate, as far as he knows, over what period of time this practice was going on.

Q. By Mr. Cooper: Over how long a period of time did that practice exist that you have just related?

A. For at least the last five years.

Q. How long have you been head of the contract department? A. About ten years.

Q. What was the practice with relation to disputes over the payment of salaries?

(Testimony of Edward Muhl)

Mr. Roth: Objected to as immaterial. The question calls for disputes as to amounts, I assume.

The Court: You might clarify the question.

Mr. Cooper: Yes, your Honor.

Q. By Mr. Cooper: What was the practice with respect to the handling of disputes? Assuming that an actor or actress claimed that there was money due that may or may not have been due, what was the practice with respect to the handling of such disputes?

Mr. Roth: Objected to as immaterial. [132]

The Court: On the assurance of counsel that evidence will be introduced showing that this plaintiff was aware of the practice, the objection will be overruled.

Mr. Cooper: I think we can show that, if your Honor please—the plaintiff's agent—not the plaintiff personally. You may answer the question.

A. Normally, if there is any dispute concerning a payment to an actor, that is, salary due or due in a different amount than has been paid, the practice would be for the actor or the actor's representative to contact my office with reference to it, and they follow through and find out what the basis for the misunderstanding or dispute was.

Q. And on occasions did you consult any law firm?

A. Loeb & Loeb, our counsel, were consulted very often.

Q. Had you had any disputes in the past with Robert Cummings, through his agent, Oscar Cummins, with respect to the payment of amounts or the non-payment of salary?

The Court: Is this for the purpose of showing knowledge on the part of the plaintiff of that practice?

(Testimony of Edward Muhl)

Mr. Cooper: It is for that purpose, your Honor.

The Court: Unless the plaintiff is not intending to dispute the fact that he was aware of this practice, it would seem to me that the question is a proper one. You may answer.

The Witness: May I have the question read, please?

(Question read by the reporter.)

A. From time to time questions had arisen as to the [133] amount of money due on certain payments, such as bonus, which became due at certain times under our arrangement with Mr. Cummings, and my office, including myself, was contacted from time to time about those questions.

Q. By Mr. Cooper: Who would contact you?

A. Mr. Oscar Cummins.

Q. Has he contacted you on more than one occasion?

A. Yes.

Q. Can you recall some specific occasions?

A. I cannot recall dates but, for example, on the conclusion of Robert Cummings' services in a photoplay, there was a bonus payable to him, whether the picture was completed for us or for outside services, and on a number of occasions—

Q. Let us take that particular case.

A. Yes.

Q. I believe the contract provided, in substance, that upon completion of a picture he was entitled to a bonus of \$2500 or \$7500, at the time of completion. Did somebody come to pick up that check? A. Yes.

Q. Who? A. Oscar Cummins.

Q. Was the check all ready for him?

A. On some occasions it was not ready.

(Testimony of Edward Muhl)

Q. On some occasion when it wasn't ready, do you recall some specific occasion when Oscar Cummins came to you about [134] the situation?

A. Oscar Cummins both came to me and called me on the telephone about several checks.

Q. As late as April 15th, 1943, were you aware of some dispute with respect to the payment of the amount of a check? A. I heard of some.

Q. You didn't handle that situation yourself?

A. No.

Q. Who did handle that? A. Emmett Ward.

The Court: May I inquire whether Mr. Ward is in your department. A. Yes, sir.

Q. By Mr. Cooper: Directing your attention to some time before April 10, 1943, did you learn from some source what Robert Cummings had notified Bob Speers?

A. Yes.

Q. From whom did you learn that?

A. I learned it in this way, from Emmett Ward, and, secondly, from Bob Speers.

Q. What did Bob Speers tell you about that?—merely for the purpose of showing knowledge, and not for the purpose of proving the truth of the statement?

A. I was advised that Cummings was not going to do the role in the picture that we wished him to do, and furthermore that we would have no more of his services for the [135] duration, because he was signing up with some service, either the Civil Air Patrol or something connected with the Army Air Corps.

Q. Did you believe that? A. Yes.

(Testimony of Edward Muhl)

Q. Sometime later you received the same information from Emmett Ward?

A. I think it was just the reverse in order.

Q. You received the information first from Emmett Ward, and then from Bob Speers? A. Yes.

Q. All right. At the time you learned this information from Emmett Ward did he show you a letter dated April 9th, or did that come later?

A. That came later.

Q. After you learned about Bob Cummings' status, what did you do?

Mr. Roth: Just a moment. I object to that as assuming that he did learn about Bob Cummings' status, assuming that there was any status.

Mr. Cooper: You may be correct. I will withdraw the question.

Q. By Mr. Cooper: When you were told that Bob Cummings was not going to be available to you for the duration of the war, did you do anything about it? Answer that yes or no.

A. Not immediately. [136]

Q. Did you also learn from some source that Oscar Cummins had phoned someone at the studio?

A. I have a recollection that there still was some possibility of conciliating the difficulty that had arisen, and that was the reason for not doing something immediately.

Mr. Roth: I move that that go out as a voluntary statement of the witness and not responsive to the question.

The Court: May we have the question?

(Question read by the reporter.)

The Court: Of course, the answer is not responsive, but I think it would be relevant at some time to inquire

(Testimony of Edward Muhl)

of the witness whether or not there was any explanation as to why he did nothing immediately upon receiving the information that he previously outlined.

Q. By Mr. Cooper: Had you also had some conversation with Dan Kelley during this period of time between April 5th and April 10th? A. Yes.

Q. About this particular subject matter of Robert Cummings? A. Yes.

Q. Now, on April 9th was a letter presented to you for your signature? A. Yes.

Mr. Cooper: I show this letter to counsel.

Q. On April 9th had you heard anything either from [137] Robert Cummings or Oscar Cummins?

A. Not that I recall. I heard nothing directly.

Q. On April 9th did you still believe that Robert Cummings would not be available to you for the duration?

A. Yes.

Q. I show you a letter which I have heretofore shown counsel, and ask you to examine that. Did you dictate that letter? A. No.

Q. Who dictated that letter?

A. Emmett Ward.

Q. Did you send that letter? A. No.

Q. Did that letter cause you to further believe that Robert Cummings would be unavailable to you for the duration?

Mr. Roth: Just a moment. The question now asks the witness for a state of mind predicated upon what someone in his department thought, and not on anything the plaintiff or any agent of the plaintiff said.

(Testimony of Edward Muhl)

The Court: While I recognize that this witness is giving testimony relative to information conveyed to him by those acting in the usual course of business, I haven't seen this paper, and I don't know whether there is merit in the objection or not. Perhaps I had better see the document and see if it throws any further light on the matter.

Mr. Roth: We haven't any objection to the court looking [138] at the paper. As a matter of fact, I was going to offer it myself, but in the question put to the witness he is asked to state his opinion as to whether or not his belief was fortified or reaffirmed from what someone in his department thought.

The Court: I am inclined to think there is merit in the objection, but before I make any ruling I would like to see the paper.

Mr. Cooper: If you still want to offer it for any purpose, I am perfectly willing.

Mr. Roth: Well, it is your offer.

The Court: I think the question as it is now put is open to the criticism made.

Mr. Cooper: Will you read the question to me, please, Mr. Reporter?

(Question read by the reporter.)

Mr. Cooper: I do not understand the effect of your Honor's remarks.

The Court: I have already indicated that the witness would be allowed to tell what information came to him from those purporting to have received it from sources on which they had a right to rely, but the question in its present form appears to ask the witness, in effect, to

(Testimony of Edward Muhl)

testify whether he agreed with the conclusion somebody else had reached, and I don't think that is a proper question.

Mr. Cooper: Well, if your Honor please, we will put the [139] question in another way.

The Court: In other words, if no further information came to the witness, then I don't see that this letter is of any help.

Mr. Cooper: I have put the question in that form to show the conduct of Universal, based upon the information received from Robert Cummings, and what they did, that they relied on it, exactly what they did.

Mr. Roth: We object to the statement of counsel. We have no objection to showing the conduct of Universal. What it was based upon will be decided by the court.

The Court: I take it, of course, that defense counsel is merely expressing his views. You haven't offered the paper for the purpose of showing that Universal pursued any particular course of conduct?

Mr. Cooper: Possibly I am premature on that. May I ask that it be marked for identification only at this time.

The Court: That will become Defendant's Exhibit C for identification.

Q. By Mr. Cooper: In any event, this letter of May 9th was not sent? A. That is right.

Q. Thereafter did you cause to be prepared or discuss with somebody in your office the telegrams of April 10th?

A. Yes.

Q. On April 13, 1943, did you have a conversation with [140] Oscar Cummins? A. Yes.

(Testimony of Edward Muhl)

Q. Have you an independent recollection of that conversation? A. Yes.

Q. Did you also refresh your recollection as to the specific details of that conversation from some document you made at the time? A. Yes.

Q. Do you know exactly what time on April 13th you had that conversation? A. Yes.

Q. What time of the day was it?

A. Between 12:00 and 1:00 o'clock.

Q. Do you have that document with you?

A. I have a copy of it.

Mr. Cooper: All right. I will show this to counsel.

Mr. Roth: Is this what he had?

Mr. Cooper: Yes. I may have made some notations on that one. You may examine the one he has. I have here the file, counsel.

Mr. Roth: That is what I thought I was looking at.

Mr. Cooper: No. That is a copy.

Q. By Mr. Cooper: What was the exact time of that conversation of April 13th? A. 12:40 p. m. [141]

Q. Did you, following that conversation, dictate a memorandum of the substance of the conversation, and the time? A. Yes.

Q. At what time after that conversation, or at what time on April 13th, did you dictate the memorandum?

A. 12:46.

Q. Three minutes later?

A. Yes—two minutes later.

Q. Will you relate the conversation that you had with Oscar Cummins at 12:40 p. m. on April 13th?

A. I earlier tried to get him that day, and he called me back sometime after 12:30, at the time of this conver-

(Testimony of Edward Muhl)

sation, and I told him that, following the information that Bob Speers had gotten from Bob Cummings over the phone, that is, to the effect that he was not going to do any more pictures for us for the duration of the war, that we had wired him to report to Dan Kelley's office on the 12th at 10:00 o'clock, and that, of course, he hadn't reported, and we intended to suspend him from the payroll as of that date. I sent him a wire—

The Court: Have him read the memorandum.

Q. By Mr. Cooper: Will you read the memorandum, then?

A. "I talked to Oscar Cummins at 12:40 p. m. April 13, 1943. Told him that following up Robert Cummings' statement to Bob Speers given over the telephone that he was in the C. A. P. for the duration and that in effect he would not [142] report for his role in the photoplay 'Fired Wife,' that we had wired Cummings to report yesterday morning to Dan Kelley, and that, of course, he failed to do so, and that we, to establish a clear position, intend to suspend him from payroll as of that date. Oscar said that was entirely proper. He further stated that he was 'sick' at the situation which had arisen and he had talked to Bob last night and that he was trying to get him to come in to have a further discussion with Bob Speers and myself. At this point I told him we were, of course, going forward with our plans to recast the role and he said he understood we would have to do this but that he didn't think this situation is fair to Bob or to the studio or to Bob's country and he would like to straighten it out."

Q. Thereafter the notice of April 15th was sent?

A. Yes.

(Testimony of Edward Muhl)

Q. Did you dictate that notice? A. No, sir.

Q. Did you see it before it was sent out?

A. Yes.

Q. Under your direction? A. Yes, sir.

Q. At the time that you sent out that notice of April 15th did you believe that Robert Cummings would be unavailable to you for the duration?

A. Nothing occurred to change my mind. [143]

Q. Now, then, on May 18, 1943, you sent another notice? A. May 18th.

Q. That is the date before the substitute completed the portrayal of the role of "Hank"? A. Yes.

Q. At that time did you still believe, or did you believe, that Robert Cummings would be unavailable to you for the duration? A. Yes.

Q. Had you ordered him taken off suspension?

A. No.

Q. Had you heard from Robert Cummings or Oscar Cummins in any manner, shape or form, between the conversation of April 15th and the sending of the notice of May 18th, to the best of your recollection?

A. No. May I expand that a little bit? I might have talked to Oscar over the telephone, but I did not receive any information leading me to believe that Cummings was later able to come.

Q. Was there any conversation, that you recall, with respect to this situation? A. No.

Q. On May 28, 1943, did you have a conversation with Oscar Cummins? A. Yes.

Q. Before you had this conversation with Oscar Cummins [144] on May 28, 1943, had you received some information from Dan Kelley? A. Yes.

(Testimony of Edward Muhl)

Q. With respect to a phone conversation he had had with Benny Thau or with Mr. Fred Datig?

A. Yes. Kelley told me that someone from Metro had called him.

Mr. Roth: I understood that Mr. Kelley denied it yesterday. I don't mind if he testifies to it.

Mr. Cooper: I just handed counsel a transcript of those conversations from our files. May I state this, if your Honor please, so that your Honor may follow the sequence of this: Mr. Kelley, on cross examination, testified yesterday, in reply to questions by Judge Roth—

The Court: I don't understand that we are arguing the case. Is there any occasion to go into the matter while the witness is on the stand?

Mr. Cooper: Yes, your Honor, I believe there is, and certainly if I finish the statement counsel will not object to it.

Mr. Roth: I am objecting even before I hear it, because I don't think there is any necessity for counsel to outline the procedure to the court. I think the court can understand things as they go along.

The Court: May I suggest that we might proceed with another question, and in the event that some uncertainty [145] arises you may then call it to my attention.

Mr. Roth: May I have a moment to look at the witness' statement?

Mr. Cooper: He is not going to testify to that statement, counsel. I am going to go on with another matter.

Mr. Roth: You handed it to me.

Mr. Cooper: Because of some objection you made a few moments ago. I handed that to you because you made some objection.

(Testimony of Edward Muhl)

Mr. Roth: You asked him a question as to whether or not he received information from Dan Kelley as to whether or not Dan Kelley had a conversation with Benny Thau on or about May 28th, and I said I had no objection to it, because I understood Mr. Kelley to deny it yesterday.

Mr. Cooper: Mr. Kelley testified that he had a conversation, he thought, about June 1st. We intend to recall him to show that it was actually May 28th.

Mr. Roth: He said after July.

Mr. Cooper: The actual record of the conversation—

The Court: Let us go on.

Mr. Cooper: Very well.

Q. By Mr. Cooper: Did you receive some information from Mr. Dan Kelley—answer this question yes or no—with respect to a conversation he had had with Benny Thau and Mr. Datig? A. Yes. [146]

Q. Following that did you phone Oscar Cummins?

A. Yes.

Q. Do you have a memorandum of that conversation?

A. Yes, I do.

Q. Will you read that memorandum, to refresh your recollection as to the details of the conversation? Do you remember the substance of the conversation?

A. Yes.

Q. Do you remember exactly what time it was that you phoned him? A. Yes.

Q. What time was it?

A. Six after ten in the morning.

Q. Did you, following this conversation, dictate the substance of that conversation to your secretary?

A. Yes.

(Testimony of Edward Muhl)

Q. At what time did you dictate that?

A. Late in the afternoon of the same day.

Q. Do you recall exactly what time it was?

A. Not exactly—between 5:00 and 6:00 o'clock.

Q. Refresh your memory as to the time.

A. 5:55.

Mr. Cooper: Counsel, have you seen this?

Mr. Roth: If it is the intention to ask about what Dan Kelley said to Edward Muhl, I am perfectly willing that that be read into the record. [147]

Q. By Mr. Cooper: Will you take that memorandum that you prepared at 5:55 p. m., and from that refresh your memory, and read us the conversation that you had with Oscar Cummins. Don't read the first sentence.

A. Start at the second sentence?

Q. Yes.

Mr. Roth: Read it all.

Q. By Mr. Cooper: Read it all, then.

A. The first sentence too?

Q. Yes. He wants the whole thing.

A. "After Mr. Kelley advised me that Robert Cummings had been offered to Metro, I stated I would call Mr. Oscar Cummins and make an inquiry as to the matter. I reached Mr. Cummins on the phone at 10:06 a. m. 5-28-43, and told him I had heard a rumor that Metro was interested in Robert Cummings and did he know anything about it. He stated he didn't know anything about it. He further stated that PRC, a producing organization that he had not heard of before called him and asked about Cummings' availability and he advised that Cummings was engaged in work in connection with the establishment of an air shuttle service and if anybody wanted him they

(Testimony of Edward Muhl)

would have to see General Arnold of the Army Air Corps to get him. He asked what had disturbed me about it. I said that I wasn't disturbed, I merely considered it a rumor, but that I decided to get him since he would know all about it and have it disproved. I said I wanted to [148] know if anybody had suggested to Metro that Cummings' suspension had been terminated or that he was in any way free of his contract with us or free to work with anybody else. He said he was positive there was nothing like it."

Q. On May 28th, which was a day or two after the alleged demand by Oscar Cummins at the studio for the payment of his compensation, did you know that any such demand had been made? A. No.

Q. Had anybody informed you of it? A. No.

Q. In this conversation with Oscar Cummins did he mention, directly or indirectly, anything about—

Mr. Roth: That is objected to as leading and suggestive and argumentative. He already testified to the conversation.

Mr. Cooper: That is correct, but we certainly have a right to suggest a particular topic, to find out whether anything else was said.

The Court: In view of the fact that there was apparently a dispute here, I think we ought to proceed rather differently. The question does bear the earmarks of a suggestion as to the answer. I will sustain the objection.

Q. By Mr. Cooper: I will ask you this: Was anything else said in that conversation? A. No.

Q. Following that conversation with Oscar Cummins, did [149] you know whether or not anyone had made a

(Testimony of Edward Muhl)

demand for the payment of Robert Cummings' compensation?

Mr. Roth: Objected to as calling for hearsay.

The Court: May we have the question?

(Question read by the reporter.)

Mr. Roth: And on the further ground that it assumes that it is necessary for him to know.

The Court: In other words, you might tell us the theory upon which you are addressing this inquiry to this particular witness.

Mr. Cooper: Very well. The witness testified with respect to the procedure and practice in the past, and at all times heretofore when there has been a dispute the matters have been taken up with the contract department, of which he was the head.

The Court: It has already been established that neither the plaintiff nor his representative contacted either this gentleman or anyone in his department.

Mr. Cooper: I understand, if your Honor please, but I want to show that he didn't know, in fact. I will withdraw the question and put it in another way.

Q. By Mr. Cooper: What was the first information that you received with respect to the fact that Robert Cummings was claiming compensation?

A. The letter dated May 29th, the letter, in any event, from Robert Cummings, announcing that the contract with us [150] was finished.

Q. That was a telegram, was it not?

A. A telegram, a communication.

Q. On June 3rd did you have a conversation with Oscar Cummings on the telephone? A. Yes.

(Testimony of Edward Muhl)

Q. What time did that take place?

A. It was in the morning.

Q. There was a record made of that conversation too.
What time was that made?

A. These notes show 12:32 p. m.

Mr. Cooper: I hand those notes to counsel.

Q. By Mr. Cooper: Will you relate the substance of the conversation?

Mr. Roth: Will you hold it for just a moment while I look at this?

Mr. Cooper: Yes.

Mr. Roth: Is this the only copy of that?

Mr. Cooper: That is the only copy I have.

Mr. Roth: It will save time if you will establish a foundation and read this.

Mr. Cooper: Very well.

Q. Now, pursuant to the suggestion of counsel, was a record made of that conversation by your stenographer?

A. Yes.

Q. Is that the conversation you have before you?
[151] A. Yes.

Q. At counsel's suggestion, read it into the record.

Mr. Roth: I assume that it was dictated.

Mr. Cooper: It wasn't dictated.

Mr. Roth: The girl took it?

Mr. Cooper: That is right.

A. "Mr. Cummins: Hello, Ed, here we are at it again.

"Mr. Muhl: Yes.

"Mr. Cummins: I wanted to talk this thing over with you at your convenience.

(Testimony of Edward Muhl)

"Mr. Muhl: Well, Oscar, all right,—what is your position in the matter—from my last talk with you, you didn't know what was taking place.

"Mr. Cummins: I didn't—I told you the truth.

"Mr. Muhl: Well,—

"Mr. Cummins: This came up—we have gone over it completely and thoroughly with Joe, myself and another counsel, and they have decided definitely there is a breach of contract here—they have decided that their next step is clear.

"Mr. Muhl: If you want to talk about it, all right, but I don't think there is a breach of contract. We have handled a lot of these things and we have not lost any on such cause in our lives and I don't think we will. Opinions are held by anybody and particularly in every lawsuit there is one held by two attorneys at least, but naturally a simple [152] courtesy for each other demands that if anything can be gained by talking, well, surely.

"Mr. Cummins: Nothing can be lost.

"Mr. Muhl: I would be willing to see you any time you say.

"Mr. Cummins: Eddie, I want to discuss this thing privately. If there is any hope to work anything out I would like to do it.

"Mr. Muhl: That's all right, since it's in a formal phase I don't think it should be completely private. I don't want to get into it, if I say anything you must realize it—from now at least so long as the status is that of a clinch I think in duty to our respective interests it cannot be completely private and confidential.

(Testimony of Edward Muhl)

“Mr. Cummins: As far as I am concerned, frankly, you can be sure that anything I say to you, you should have the right to discuss it with anyone—I could never look myself in the face if I did anything—I do claim your friendship.

“Mr. Muhl: Since you represent Bob I don’t think any conversations can be in confidence.

“Mr. Cummins: Only fair play.

“Mr. Muhl: We are all reserving our rights.

“Mr. Cummins: I sent you another telegram today with Bob’s consent.

“Mr. Muhl: I haven’t it yet.

“Mr. Cummins: I would like to discuss it with you to [153]work something out. I have to be at the doctor’s at 2.

“Mr. Muhl: I also have an appointment—someone from downtown, around that time.

“Mr. Cummins: Suppose I get there around 3.

“Mr. Muhl: Supposing you check with me at 2:30 or 3.”

Q. By Mr. Cooper: Following that telephone conversation—

The Court: Let me interrupt to make sure that I followed some previous testimony. What did I understand you to say, Mr. Muhl, as to the memorandum being dictated on May 28th, about 5:55 p. m.? What was that?

A. That was a memorandum of a conversation with Mr. Cummins.

The Court: Was that this one?

A. No, sir. This was on June 3rd.

(Testimony of Edward Muhl)

Mr. Roth: The other one, I think, has already been read? A. That is correct.

Mr. Cooper: I have another one. I think counsel might take about five minutes to read it. Does your Honor take a morning recess or not?

The Court: Well, if counsel wishes.

Mr. Cooper: No, it isn't necessary, but I just thought that if you did this would be a good time to do it.

The Court: Very well. We will take a five-minute recess.

(Short recess.)

Mr. Roth: Was that on June 1st?

A. June 3rd. [154]

Mr. Roth: I am willing that that may be read into evidence by the witness, with the exception of the parenthetical inserts which are in that typewritten copy.

Q. By Mr. Cooper: Following your phone conversation with Oscar Cummins that you have just related, on the same date did he visit you at your office?

A. Yes.

Q. Did you have a conversation in the office?

A. Yes.

Q. Who were present at that conversation?

A. Myself and Mr. Emmett Ward, after the first moment. In other words, Emmett Ward—

Q. In other words, Emmett Ward was not there at the first moment, for the first moment or two of the conversation, and came in afterwards? A. That is right.

Q. Following this conversation between you, at which Emmett Ward was present, and Oscar Cummins, did you dictate the substance of that conversation to your secre-

(Testimony of Edward Muhl)

tary, to refresh your memory as to the specific details?

A. Yes.

Q. How long after the conversation did you dictate it?

A. Within a few moments, certainly not over half an hour.

Q. What time did you actually dictate it?

A. 4:44 p. m. [155]

Q. The conversation started when? A. 3:40.

Q. With counsel's permission, you may read it, leaving out the observation in parentheses.

Mr. Roth: At the bottom of the page, and the first three or four lines of the second page.

The Witness: In the paragraph following that there is some data.

Mr. Roth: That is conversation, I take it?

A. Yes.

Mr. Roth: He said he outlined the proposition—all right.

A. "I met today with Mr. Oscar Cummins pursuant to an appointment requested by him. He arrived at 3:15 p. m. but I was tied up until approximately 3:40 p. m. Mr. Ward was present during the entire conversation, excepting the first few seconds, which were spent in nothing more than greetings.

"Mr. Cummins opened the conversation jovially by stating 'Well, here we are again.' He stated that when I talked to him over the telephone last week that he actually had known nothing about the position that was being taken by Cummings, that he had been truthful and sincere in his conversation. He further stated that the situation between Cummings and Universal had been reviewed by himself, his brother, and another attorney, former Justice

(Testimony of Edward Muhl)

of the Supreme Court of the State of California, and they decided there was a definite [156] breach of the contract on our part. My reply to this was that I was not going to argue that aspect of the case. They claimed there was a breach and we were positive there was not; that we were both entitled to our opinions. He spent a considerable time telling me how he disliked our going to litigation and he wanted to avoid it if possible. My reply to this was that it was a commendable attitude—that we felt the same way. He then outlined the reasons why he considered there had been a breach. I stated I felt these were based on misinterpretation or possibly lack of knowledge of our contract rights and we still were positive there was no breach.

“He stated that furthermore they had made demand for Cummings’ compensation, on Wednesday, May 26, 1943, by sending two people to ask for his check and that it had not been given to them and that further that they had called the Treasurer of this corporation and asked for the check and were told there was no check since Mr. Cummings was on suspension. He stated that they had two girls in the office to take down this conversation with the ‘treasurer.’

“He outlined his proposition to us concerning which I stated that I, speaking for the studio, could not entertain. He stated there would probably be a lawsuit. Mr. Ward and I stated that we were very confident of our position, not only that we were legally correct, but that morally we had done everything possible to live up to the terms of the under- [157] standing that we had ostensibly reached with Mr. Cummings and Mr. Cummins a few weeks ago. He

(Testimony of Edward Muhl)

protested that Cummings was sincere when that understanding was reached. I stated I didn't doubt his sincerity, that I had considerable doubt as to his stability. I stated I thought his actions were somewhat childish and not on the plane of the understanding we had reached, and that while I did not include Cummins since he had assured me he did not know of Mr. Cummings' plan, that there had been a deliberate effort to entrap us in a legal situation to the end that Mr. Cummings would be relieved of his responsibilities under his contract with us.

"There was further discussion concerning matters not connected at all with Mr. Cummings and of a general nature. Before he left I asked him if Mr. Cummings had been in town during the period commencing May 18, 1943, and explained that my reason for asking him was that in the course of a conversation which I had with him over the telephone during the week ending May 29, 1943, relative to our possibility of needing him for a 'wild line' in Cummings' last picture, he had told me that Cummings would be in town on Friday or Saturday of that week, and clearly implied that at the time of that conversation, which was on Tuesday or Wednesday, that he was not in town. I stated at that time that if the wild line was shot it would be done on Tuesday or Wednesday of the following week. Mr. Cummins stated that Mr. Cummings had been in town and available during the period in question."

[158]

Q. By Mr. Cooper: Now, thereafter did somebody present to you a clipping from a newspaper? I will show this to counsel. Now, I show you a memorandum, with a clipping attached, and ask you if that was delivered to you by someone?

(Testimony of Edward Muhl)

Mr. Roth: If the court please, I would like to state my position on that. The conversation, of course, which the witness just finished was on June 3rd, and the other conversation was on June 1st, and they were all after the date of termination here. We haven't objected to them, because they are so close to the date of termination that they might be considered pertinent or material. This clipping referred to in the pleadings is a clipping from the Los Angeles Times, and the interchange department of the Army or Air Service, and they show on their face that they were received some time in July, long after the termination, at least a month and a half after the termination, and I don't see how they are permanent to an estoppel, and I am going to object that they are not pertinent to the defense of estoppel, and that they are not material, and are obviously hearsay, because this is a clipping from a newspaper, and is not evidence.

Mr. Cooper: If your Honor please, I am generally in accord with the view of counsel, and that anything that appears to have happened after the 3rd of June, generally speaking, is immaterial. However, counsel, in the stipulation of facts, wanted a stipulation as to the continued sending of the notices up to and including the present date, [159] and we want to offer this to show knowledge coming to the defendant corporation, as to why they continued to send the notices. That is the only purpose.

The Court: May I inquire upon what theory that is in the record, the fact that notices were continued to be sent?

Mr. Roth: Mr. Cooper just stated that counsel for plaintiff wanted to have these notices which were sent made a part of the stipulation. The only reason I agreed to it was because I thought counsel for the defense wanted

(Testimony of Edward Muhl)

it in the record. I have no theory with respect to the notices sent after May 29th or June 3rd. In other words, the notice of June 3rd is the last notice which is pertinent here.

Mr. Cooper: If your Honor please, if counsel will move to strike, then, any notice that may be detailed here, and not referred to in the argument, after June 3rd, I believe anything that happened after June 3rd, aside from admissions of fact and things of that sort would be immaterial.

Mr. Roth: I am not conceding that what happened on June 3rd is material. But for the purpose of this case I am not objecting to what occurred after June 3rd.

The Court: Let me interrupt to say that apparently you both are in accord on this proposition, that all the notices referred to in the stipulation of facts, or in the pleadings, as having been sent after June 3rd, 1943, may be stricken from the record?

Mr. Roth: That is satisfactory to the plaintiff. [160]

Mr. Cooper: That is satisfactory to the defendant.

The Court: That will be the order.

Mr. Cooper: May I just state this, for the purpose of the record, if your Honor please, to show the good faith in the pleadings, that we have a letter from an officer of the Army Air Corps—

Mr. Roth: There is no question of good faith involved.

Mr. Cooper: That is in the pleadings, may it please the court.

Q. By Mr. Cooper: Now, in this conversation of June 3rd there was some reference to a proposition. Had

(Testimony of Edward Muhl)

you had some previous discussion with Oscar Cummins with respect to a proposition? A. Yes.

Q. When was that?

A. That was sometime prior to June 3rd. I couldn't establish the date. There were a number of conversations between Mr. Cummins and myself.

Q. Was it before the telegram of April 10th was sent?

A. I believe it was after that time.

Q. Could you positively fix it between May 18th and May 29th? A. No, I couldn't.

Q. Did you make any record of that? A. No.

Q. From your best recollection, can you fix it, then, [161] between some points?

A. After April 10th and prior to June 3rd.

Q. That is the best you can fix that?

A. That is right.

Q. Why didn't you make a record or note of that?

A. The conversation was quite of a general nature, representing proposals that I didn't care to discuss specifically, relative to a change in the employment situation between Cummings and Universal, that we were not entertaining. They weren't of a very definite nature.

Q. Was there more than one conversation?

A. I think there was more than one conversation at which Mr. Cummins—

Q. Mr. Oscar Cummins?

A. Mr. Oscar Cummins—suggested, as I recall, some different kind of arrangement regarding the employment of Robert Cummings.

Q. What different kind of employment did he suggest?

A. One of the suggestions he made was that we go on a so-called picture basis, so that we would have a right to

(Testimony of Edward Muhl)

have one or two pictures with Robert Cummings, instead of having him under term contract.

Q. Did he explain to you the reason for that?

A. There were two reasons, as I recall. One was that a considerable amount or part of his time was going to be devoted or was expected to be devoted to this government [162] service, and that would leave him with only specified times to do pictures, and he didn't want to work exclusively for Universal, but wished to acquire the right to work for some other studio.

Mr. Cooper: You may cross examine.

Cross-Examination

Q. By Mr. Roth: Mr. Muhl, you have just testified to a conversation that you had with Mr. Oscar Cummins, the date of which is indefinite in your mind, but you fix it somewhere between April 10th and June 3rd?

A. That is my recollection. There was more than one conversation.

Q. When was the first of that series of conversations?

A. I can't fix it more definitely than I have.

Q. You wouldn't bunch them all up to say between May 29th and June 3rd, would you? A. No.

Q. Did any of them take place between April 10th and May 19th?

A. I can't state definitely. I think it is possible that they did. Mr. Cummins and I were sometimes in communication, and many things were discussed.

Q. Did any of them take place between May 19th and June 3rd?

A. It is possible. I can't fix it more definitely than I have. [163]

(Testimony of Edward Muhl)

Q. In any event, there were a series of conversations between April 10th and June 3, 1943, between yourself and Mr. Cummins, discussing the proposition that you have just outlined in your testimony?

A. Propositions of that nature—not a series—I wouldn't say a series—possibly two conversations or three conversations, but my recollection is more than one, and there might have been more than two.

Q. And did you discuss in all those conversations approximately the same things, that is, that Mr. Cummins said to you that arrangements might be made whereby Robert Cummings could do one picture for Universal, and the reason was that Robert Cummings was thinking of going into government work?

A. He had said before, and I knew, that Robert Cummings was in government work.

Q. But you have just testified that Oscar Cummins said to you in these conversations that the reason he was making those suggestions to you was that Robert Cummings was thinking of going into government work?

A. Yes, sir.

Q. Then you knew that Robert Cummings at that time was not in government work?

A. I knew he was in government work, but there could be a change in the situation with reference to his work with the government. [164]

Q. You had known, hadn't you, that Robert Cummings was in government work, for at least some months prior to April 10, 1943?

A. I knew he was in the Civil Air Patrol. I had seen him in the uniform of that organization.

(Testimony of Edward Muhl)

Q. Many times prior to April 10, 1943?

A. I think on only one occasion.

Q. But you knew he was in the Civil Air Patrol for some months prior to April 10th? A. Yes.

Q. Didn't you know that from Robert Cummings himself?

A. Yes; I had had conversations with him, and he told me some of his experiences.

Q. What specifically made you believe that he was permanently in the government service after April 10, 1943?

A. From the positive statements he made to Speers and Speers' report to me.

Q. And what else?

A. That is the principal reason.

Q. Are there any other reasons? Did you have any information, other than the report of Speers to yourself, that Robert Cummings was going to go into government service for the duration of the war, upon which you based your belief that he was actually in the government service?

A. Yes. There was a background from conversation between Oscar Cummins and myself for a period of time about [165] Bob Cummings' desire to go into government work.

Q. When did that background of conversations start?

A. During the whole period of time that Mr. Cummins and I discussed the affairs of the studio and Robert Cummings.

Q. When did it start?

A. I can't place it more definitely than that—some months prior to April 10th, and during the war.

Q. In this series of conversations that you had with Oscar Cummins between April 10, 1943, and June 3, 1943,

(Testimony of Edward Muhl)

did you ever ask Oscar Cummins specifically whether or not Robert Cummings was permanently in the government service?

A. I don't recall asking him specifically, no.

Q. You have also testified that you read this telegraphic notice of April 10th which was sent to—I will withdraw that—which at least was delivered to the telegraph office, which is in evidence here as Defendant's Exhibit A. Do you know the telegram I have in mind?

A. Yes.

Q. Why didn't you say in that telegram anything about the fact that you had heard he was going to be permanently in war work?

A. I didn't say so. That was an instruction to report.

Q. But you knew at the time, or you believed at the time, from what Mr. Speers had told you and from numerous conversations you had had with Oscar Cummins prior to that time, that Robert Cummings was going to be engaged in war [166] work?

A. I so believed.

Q. You also have testified that you read, before it was sent, the notice of April 15, 1943, the original of which I show you. That is your signature, isn't it, Mr. Muhl?

A. Yes, sir.

Q. Is there anything in that notice which indicates to Mr. Robert Cummings that he was suspended because of the fact that he was permanently enlisted in the armed forces of the United States or engaged in some other branch of war work?

Mr. Cooper: To which we object on the ground that it calls for a conclusion of the witness.

(Testimony of Edward Muhl)

The Court: It is engaging in an argument with the witness.

Mr. Roth: I will reframe the question.

Q. By Mr. Roth: The notice of April 15, 1943, Mr. Muhl, in the second paragraph thereof, advises Mr. Robert Cummings that "at the time of such failure, refusal or neglect you were cast to portray a role in a photoplay, to-wit, the role of "Hank" in the photoplay now entitled "Fired Wife." And by reason of your failure, refusal or neglect, we are engaging another person to portray such role. We accordingly elect to, and do, hereby exercise the further right granted to us under the provisions of said paragraph 12 of [167] the said contract to refuse to pay you any compensation until the completion of such role by such other person." Why didn't you elect to refuse to pay compensation, Mr. Muhl, until the termination of his service with the government of the United States?

A. May I see that, please?

Q. Yes.

A. This really states that we refuse to pay him any compensation during the period of his failure, refusal or neglect.

Mr. Cooper: The first paragraph you are referring to?

A. Yes.

Q. By Mr. Roth: And the reason, then, that you didn't state it specifically, is because you felt that the first paragraph covered it?

A. I think the letter covers it the way I wanted it. I read it and it seemed to me to cover the situation, and I think it does.

(Testimony of Edward Muhl)

Q. May I show you the letter of April 9th, which has been marked for identification? That letter of April 9th, which is Defendant's Exhibit C for identification, was prepared under your direction and supervision, was it not?

A. No, sir.

Q. Was it submitted to you? A. Yes.

Q. And you personally decided not to send it? [168]

A. Yes.

Mr. Roth: We offer the letter in evidence.

Mr. Cooper: May it have the same number?

Mr. Roth: Yes, it may have the same number. And I presume, on stipulation, it may now go in as Defendant's Exhibit C.

The Court: It will be marked in evidence as Defendant's Exhibit C.

[DEFENDANT'S EXHIBIT NO. "C"]

UNIVERSAL PICTURES COMPANY, INC.

Universal City, California

April 9, 1943

Registered Mail

Mr. Robert Cummings,
c/o Oscar R. Cummins, Esq.,
California Bank Building,
Beverly Hills, California.

Dear Mr. Cummings:

You have heretofore notified Mr. Robert Speers, by telephone, that you have enlisted in the Civilian Air Patrol

(Defendant's Exhibit C)

for the duration of the present war and will therefore be unavailable to us for the rendition of any service pursuant to your contract of employment with us dated November 21, 1938, as heretofore amended and extended. This is to notify you, therefore, that, commencing as of April 9, 1943, said contract of employment with us dated November 21, 1938, as amended and extended, shall be and is hereby suspended, both as to compensation and as to the running of the now current term of employment of said contract.

Nothing herein contained shall be construed as a waiver by us of any rights that we may have in the premises, either at law or in equity or under said contract of employment between us dated November 21, 1938, as amended and extended.

Very truly yours,

UNIVERSAL PICTURES COMPANY, INC.

By.....

Assistant Secretary

Edward Muhl

epw:vv

[Endorsed]: Case No. 3242-H-Civ. Cummings v. Universal. Defendant's Exhibit No. "C". Date: Jan. 5, 1944, for Identification. Date: Jan. 5, 1944, in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [246]

(Testimony of Edward Muhl)

Q. By Mr. Roth: Can you give us any explanation, Mr. Muhl, why you didn't make typewritten transcriptions of the conversations you had with Oscar Cummins between April 10th and June 1, 1943?

The Court: Did you withdraw the question as to why the witness neither dictated nor otherwise made any memorandum of any of those conversations?

Mr. Roth: I expect to ask this question first, and follow it up later.

The Witness: May I have the question read, please?

(Question read by the reporter.)

A. I can only say that it is my habit to make transcripts or memoranda of certain conversations that I think bear on important issues, and in a great many conversations I have I do not make them.

Q. One of the reasons I asked the question, Mr. Muhl, is because, apparently, at least, as far as my knowledge is concerned from what has been submitted for my inspection [169] from the files of your counsel, it is apparent that the first typewritten transcript of a conversation between yourself and Oscar Cummins is dated April 13, 1943. I show you the one from which you first read. According to your own testimony, there were other conversations with Mr. Oscar Cummins after that date on the same subject matter. According to your last answer, you considered the subject matter sufficiently important to make transcriptions of the conversations.

Mr. Cooper: Pardon me, counsel. If I understand the question correctly and if I understand the facts correctly, I object to the question on the ground that it is not a fair question.

(Testimony of Edward Muhl)

Mr. Roth: You can't understand the question, because you didn't permit me to finish the question.

Mr. Cooper: I humbly beg your pardon.

Mr. Roth: I will rephrase the question.

Q. By Mr. Roth: You did consider the subject matter of Robert Cummings, and everything that took place in respect of Robert Cummings, after the notice of April 10, 1943, an important subject, did you not?

A. Yes.

Q. And you did commence on April 13, 1943, to make a complete transcript or dictate the substance of all conversations that you had with Oscar Cummins after that date?

A. On April 13th I dictated the substance of a conversation had on that day, because the conversation seemed important to me.

Q. And the other conversations with Oscar Cummins did not seem important to you, and that is the reason you didn't dictate any transcript of them?

A. That is right. I didn't think any memorandum would be necessary for whatever conversations were held at that time.

Q. I understood you to testify that you didn't see the notice sent to you by Robert Cummings, which is dated May 29th, until some time after June 3rd.

Mr. Cooper: I didn't so understand that.

A. I don't recall so testifying.

Q. By Mr. Roth: Do you know what document I refer to when I refer to the notice of May 29th?

A. I think you are referring to the one sent by Cummings stating that, for certain reasons, the contract had been terminated.

(Testimony of Edward Muhl)

Q. When did you first receive that notice, or when was it first called to your attention? A. On receipt.

Q. When did you receive it, then?

A. The telegram will show exactly what time it came in. The telegram, I assume, is dated on May 29th.

Q. Did you have that telegram, or had you seen that telegram, before you had the conference with Mr. Oscar [171] Cummins, at which Mr. Ward was present, in your office, on June 3rd? A. Yes, I am sure I did.

Q. How long prior to that time had you seen it, before that time?

A. Three days, possibly four days.

Q. You had no knowledge, or did you have any knowledge, prior to the receipt of that telegram, that Robert Cummings intended to terminate his contract with Universal?

A. No, no direct knowledge. He had earlier tried to terminate his contract with us.

Q. That was prior to April 10, 1943?

A. Yes; that is correct.

Q. Had you instructed Mr. Dan Kelley to make transcripts of telephone conversations that he had with Robert Cummings, or with anyone else, pertaining to this case? A. No.

Q. Do you know that Dan Kelley made a transcript of a telephone conversation that he had with Mr. Benny Thau, of M-G-M, on May 28, 1943?

A. I was informed of that, yes.

Q. You have seen that transcript?

A. Yes, I had it. I haven't read it myself. I had it read to me.

(Testimony of Edward Muhl)

Q. You also made a transcript of a conversation on May 28th? A. That is correct. [172]

Q. Did you make any transcript of the conversations between April 13, 1943, and May 28, 1943, that you had with Robert Cummings or Oscar Cummins?

A. No, I don't recall any.

Q. Can you tell us why you made a transcript of the conversation on May 28th?

A. Because the studio—Mr. Kelley, when he spoke to me, was quite excited, and I suspected that something was going on, and I said there was one thing to do, "I will call Oscar and ask him directly," so I did, and on receiving his answer I dictated it, so that I would have a clear recollection of it when the matter came up for report to my superior officer and making other uses of it to which I might want to put it. It seemed clear and unequivocal to me, so I made a record of it.

Q. You testified that you had had differences with Mr. Cummings before? A. Yes.

Q. And they were adjusted? A. Yes.

Q. You knew on April 10th that there was a difference with Mr. Robert Cummings, did you not? A. Yes.

Q. Did you make a transcript of the conversation that you had with Bob Speers? A. No. [173]

Q. You have no memorandum or data of any kind in your file which shows that you had a conversation with Bob Speers on the date or about the date that you had it, or what was said between yourself and Bob Speers?

A. No.

Q. Nothing at all? A. No.

(Testimony of Edward Muhl)

Q. Between the time you had the conversation with Bob Speers and June 3, 1943, did you communicate with Robert Cummings directly in any way at all?

A. No.

Q. Did you attempt to investigate, or make a request to any official at Universal that Universal direct an investigation to be made as to whether or not Robert Cummings had signed up for the duration of the war with the Civil Air Patrol or with any branch of the armed forces of the United States or for any sort of government work?

A. What is that? Did I cause any investigation to be made?

Q. Did you cause any investigation to be made, or did you request any official of Universal to make such an investigation?

A. No.

Q. Now, Mr. Muhl, I think you have testified—I don't know whether I understood you correctly, so correct me if I state it improperly—that you had several conversations [174] with Mr. Oscar Cummins in respect of whether or not bonus payments on previous pictures were due?

A. I had such conversations.

Q. Several or one?

A. More than one.

Q. Can you mention the pictures on which those controversies took place?

A. No. The only thing that comes clearly to my mind was that a request was made once of me relative to a bonus that was accruing to Cummings for services in a Warner Brothers picture.

Q. Isn't that the only one?

A. No; I think there were others. And in addition to the bonus requests, Cummins frequently had recourse to me to discuss some aspect of Cummings' salary.

(Testimony of Edward Muhl)

Q. Any discussion that you had with Mr. Oscar Cummins on the question of salary, as distinguished from bonus, was always a discussion as to the amount that was due?

A. Yes, always the amount that was due, or whether the salary was payable for a certain period of time. There was a lay-off provision in the contract, and sometimes there would be a disagreement or failure to understand just what had been done as far as compensation was concerned, for particular periods of time.

Q. Had Oscar Cummins or Robert Cummings, or anyone on behalf of either of those two, ever, prior to April 10th, [175] come to you and complained that Robert Cummings or Oscar Cummins had appeared at the cashier's window at Universal to ask for his salary check, and there was no check there for them?

A. No, I don't recall any complaint on that subject.

The Court: May I interrupt to ask: When you gave that last answer, did you mean to imply that that subject was spoken of by Mr. Oscar Cummins to you?

A. Yes, your Honor, he did. I meant to convey this, that from time to time Mr. Oscar Cummins had discussions of salary matters and checks and sums due to Mr. Robert Cummings, and he would come to my office, after being dissatisfied either with the amount of the payment or there not being any check at the usual place when he called for it. That is my distinct recollection.

Q. You say he had come to you when there was not any check there waiting for him. Can you remember any specific instance in which that was done?

A. I can remember no date and no particular check.

(Testimony of Edward Muhl)

Q. Can you remember approximately the subject matter with respect to which it was, that is, a picture or a particular lay-off?

A. No, I can't remember the particular picture. I can't even remember all the pictures that Mr. Cummings has been in. But I do recall that the requests were made of me to straighten out a situation which resulted in a failure of [176] the check being ready on time.

Q. Well, we are agreed that the situation did occur in respect of at least one bonus check. Did it occur in respect of any checks that were not bonus checks, and where the difference of opinion was as to the amount of the check?

A. It occurred specifically—say some salary that wasn't paid for a period we considered lay-off, and that Mr. Cummins considered was not time properly taken as lay-off.

Q. Other than that lay-off incident to which you are now testifying, did it occur?

A. I can't refer to any other specific instances, no, sir.

Q. Can you particularize in respect to that lay-off period, and tell us when it occurred and what was said on the subject?

A. I can't tell you when it occurred without having recourse to our files, but the general situation surrounding it was this: Mr. Cummins was under the impression that by a previous schedule or agreement in the contract, that the minimum guarantee of salary payable had become 42 weeks instead of 40, as provided in the original contract, and when we concluded that the last two weeks was lay-off, he complained about it, stating that that wasn't

(Testimony of Edward Muhl)

according to the understanding, and there were several conversations about that; and it later was all resolved, and finally we granted that that might have been the correct understanding, and formalized that understanding in writing. [177]

Q. Now, Mr. Muhl, you signed an affidavit in this case? A. Yes, sir.

Q. Didn't you? A. Yes, sir.

Q. On the 3rd day of November, 1943?

A. I believe that is correct.

Q. And in that affidavit you referred to a conversation that you had with Oscar Cummins, and I direct your attention to it on page 2, line approximately 22, on March 28, 1943, in respect of this P. R. C. situation?

A. Yes.

Q. In your testimony this morning you fixed that conversation as May 28th instead of March 28th?

A. Yes, sir.

Q. The statement in your affidavit as to the date, then, is in error? A. That is correct.

Q. Do you have any data or memoranda in your files, which you have looked at since you signed this affidavit and swore to this affidavit, which has changed your mind as to the accuracy of the date? A. Yes.

Q. Where is that memoranda?

A. A copy of it is in my pocket. I believe Mr. Cooper has other memoranda of mine relating to the conversation,

(Testimony of Edward Muhl)

but I have also, since looking at my former conversations [178] and register of telephone calls, corroborated the date of May 28th instead of March 28th.

Mr. Roth: I presume, Mr. Cooper, I may look at that memorandum during the noon hour.

The Witness: I have also the secretary's register, if you would like to see that.

Q. By Mr. Roth: In this May 28th memoranda, the portion, I presume, that you refer to, is that, "He further stated that P. R. C., a producing organization that he had not heard of before, called him and asked about Cummings' availability."

A. I am not sure what you mean.

Q. I merely call your attention now to what you did say in your transcript of the conversation. A. Yes.

Q. Is it upon that, specifically, that you now are prepared to say that the date was May 28th and not March 28th? A. That is correct.

Q. Was that memoranda, Mr. Muhl, written up the same day you dictated it? A. Yes, sir.

Q. Did you read it before it was filed?

A. At least, that is my best recollection. If it wasn't written that day, it was written the next morning.

Q. After it was typewritten by your secretary was it placed in your files, or was it submitted to you and did you [179] read and correct it before it was placed in the files? A. I can't recall.

(Testimony of Edward Muhl)

Q. You have no recollection of whether or not you read it before it was placed in the files?

A. No, I don't. I could only answer that that would be my normal custom.

Q. You knew that that memorandum of May 28th, and the memorandum of April 13th, and the one on June 3rd, the transcript of Kelley's conversation with Benny Thau, of M-G-M, were in the files?

A. I knew there was certain memoranda in the files relative to those conversations.

Q. Did you refer to this memoranda before you signed this affidavit? A. No, I did not.

Q. You knew, of course, that Universal was in a lawsuit with respect to Cummings at the time you signed this affidavit, didn't you? A. Of course.

Q. Is there anything in your affidavit, to which I have directed your attention, and which you signed on the 3rd of November, 1943, which calls attention to the fact that you had a conversation with Bob Speers?

A. I think not, although I haven't looked at this.

Q. If there is any question in your mind as to whether or not there is, will you look at it? [180]

Mr. Cooper: I think the affidavit speaks for itself, and I am pretty sure there isn't.

The Court: That is, of course, I think a correct observation.

(Testimony of Edward Muhl)

Mr. Cooper: I will withdraw the objection.

The Court: This occurs to me: The witness being on the stand, at least he should be afforded the opportunity of making any explanation he desires.

Mr. Roth: May I add that Mr. Cooper, in his direct examination, took the opportunity of asking the witnesses for their explanation in advance of their testimony.

Mr. Cooper: I had it in my notes, and it was overlooked. I assure you that is a fact.

The Witness: May I have the question, please?

(Question read by the reporter.)

Mr. Roth: I will repeat the question. Is there anything in that affidavit which refers to any conversation you had with Bob Speers? A. No, sir.

Q. It is correct, isn't it, or is it correct, Mr. Muhl, because I understood Mr. Speers to testify to it yesterday, that when Mr. Speers told you about the conversation he had with Oscar Cummins you asked him to make a memorandum of that conversation? A. Yes, sir.

Q. And yet you didn't make a memorandum of your conversation with Mr. Speers? [181]

A. No, sir.

Mr. Roth: It is 12 o'clock, your Honor.

The Court: Yes. We will resume at 2 o'clock.

(Whereupon an adjournment was taken until 2 o'clock p. m., Wednesday, January 5, 1944.) [182]

2 O'clock p. m., Wednesday, January 5, 1944.

(Parties present as before.)

EDWARD MUHL

(Recalled.)

Cross-Examination

(Continued.)

Mr. Roth: If the court please, I think we can stipulate that during the noon recess I asked the secretary of Mr. Muhl, who is Edythe Rubens, to look at her notes and ascertain, if she could, on what dates between April 10th and June 3rd there were telephone conversations between Mr. Muhl and Oscar Cummins, and from out of her notebook she gave me these dates:

On April 13th there was a telephone conversation at 12:35. On April 14th—

Mr. Cooper: Pardon me, Mr. Roth. Were those incoming or outgoing calls?

Mr. Roth: I will have to give you more than that.

On April 13th, at 11:32, there was an outgoing call from Mr. Muhl to Mr. Cummins, which was not completed.

Mr. Cooper: That is Oscar Cummins?

Mr. Roth: Oscar Cummins. At 12:35 there was a call from Oscar Cummins to Mr. Muhl, which was completed.

At 12:16 on April 14th there was a call from Oscar Cummins to Mr. Muhl, which was completed.

At 12:50, the same day, there was a call from Mr. Muhl to Oscar Cummins, which was not completed. [183]

At 12:58 of the same day there was a call from Mr. Cummins to Mr. Muhl, which was completed.

(Testimony of Edward Muhl)

On May 5th there were two calls from Oscar Cummins to Mr. Muhl, which were completed, one at 3:46 p. m., and the other at 4:10 p. m.

On May 7th there was a call at 10:35 a. m. from Oscar Cummins to Mr. Muhl, which was completed.

On May 26th there was a telephone call, at 10:27, from Mr. Cummins to Mr. Muhl, which was completed. At 3:10 there was a call from Oscar Cummins to Mr. Muhl, which was not completed. At 4:20 there was one from Mr. Cummins to Mr. Muhl, which was not completed. At 4:50 there was one from Mr. Muhl to Mr. Cummins, which was completed.

On May 27th, there was a call from Mr. Muhl to Mr. Cummins, at 10:25 a. m., which was not completed. There was a call from Cummins to Muhl at 11:20 a. m., which was not completed. There was one from Mr. Cummins to Mr. Muhl at 12:25, which was not completed. And there was one at 2:13 p. m. from Mr. Cummins to Mr. Muhl, which was completed.

On May 28th there was a call from Mr. Muhl to Mr. Cummins at 10:06, which was completed.

On June 3rd there was a call from Mr. Cummins to Mr. Muhl, at 11:00 a. m., which was not completed. And at 12:32 there was a call from Mr. Muhl to Mr. Cummins, which was completed.

Mr. Cooper: We accept that stipulation, and may I [184] suggest to the court—

The Court: I assume that in each instance you are referring to Oscar Cummins?

Mr. Roth: In each instance I am referring to Oscar Cummins.

(Testimony of Edward Muhl)

Mr. Cooper: May I make this suggestion, that we offer that slip in evidence, so that we may refer to it, because I don't have that data.

Mr. Roth: I have no objection.

Mr. Cooper: With the court's permission, that will be the next exhibit in order?

The Court: That will become Plaintiff's Exhibit 2.

[PLAINTIFF'S EXHIBIT NO. 2]

| | | In | | Out |
|-----|----|---------------------|--|----------------|
| Apr | 13 | 12 35 X | | 11 32✓ |
| | 14 | 12 16 X & 12 58 X | | 12 50✓ |
| May | 5 | 3 46 X & 4 10 X | | |
| | 7 | 10 35 X | | |
| | 26 | 10 27 X 3 10✓ 4 20✓ | | 4 50 X |
| | 27 | 11 20 } ✓ 2 13X | | 10 25✓ & 6 28✓ |
| | | 12 25 } ✓ | | |
| | 28 | | | 10 06 X |
| Jun | 3 | 11 00✓ | | 12 32 X |
| | 4 | 10 23 11 02 | | 10 44 |

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Plaintiff's Exhibit No. 2 in Evidence. Date: Jan. 5, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [237]

(Testimony of Edward Muhl)

Q. By Mr. Roth: Mr. Muhl, between April 10th and May 29, 1943, did you have a conversation with Mr. Prinzmetal, of Metro-Goldwyn-Mayer?

A. I believe I did.

Q. On the subject of the services of Mr. Robert Cummings? A. Yes.

Q. Can you fix the date with more particularity?

A. I am inclined to believe it was in the latter part of that period. I can't be certain.

Q. Would you say it was in the latter part of April or the early part of May?

A. It might have been. I wasn't in my office at the time I received the call. [185]

Q. What was the conversation?

A. I talked to Prinzmetal from one of the offices of Loeb & Loeb. I was there on some kind of business.

Q. Very well.

A. Prinzmetal was inquiring as to whether or not, if they could get Cummings to do a picture for them, as to what position we would take in the matter, and he stated further, made some statement that inclined me to believe there was a possibility that that had either been discussed, or that something presented itself to his mind as a possibility that that might be accomplished, and, if it were, it might be a possible way of solving our then-present difficulty with Mr. Cummings.

Q. Did you tell Mr. Prinzmetal in that conversation that there was no possibility of getting Robert Cummings to do a picture, because he had signed up with the armed forces of the United States for the duration of the war?

A. No, I don't recall telling him that. I didn't initiate the conversation.

(Testimony of Edward Muhl)

Q. Well, irrespective of who initiated the conversation, did you tell that to Mr. Prinzmetal in any conversation? A. I don't recall it.

Q. Do you recall a meeting in your office some time between April 10th and May 29th, 1943, between yourself, Oscar Cummins and Bob Speers?

A. No, I don't; I don't recall. I remember a meeting [186] at which Mr. Cummins and Mr. Speers were present, in my office, but I can't place the time.

Q. In any of the conversations you had with Oscar Cummins between April 10, 1943, and June 3, 1943, in which an adjustment of this contract, I understand, was spoken of, or an adjustment of the situation was spoken of, did you say to Oscar Cummins that there was no use talking about an adjustment of the situation, because Robert Cummings had signed up with the armed forces of the United States for the duration of the war?

A. No. I recall that—

Q. That is an answer to the question.

Mr. Cooper: If your Honor please, the witness has a right to explain.

Mr. Roth: Well, if the witness or the court feels that an explanation is necessary, I am willing to have him explain.

The Court: May we have the question and the answer read?

(Record read by the reporter.)

The Court: Do you desire to explain your answer?

A. Yes; I wanted to explain why that didn't come up. It was well known to—

(Testimony of Edward Muhl)

The Court: Well, I don't think that is an explanation of the answer. The purpose of an explanation to a witness' answer is to make clear the meaning of his answer, lest it be construed in some manner different from that intended by the witness. [187]

Mr. Roth: I have no further questions.

Redirect Examination

Q. By Mr. Cooper: Referring to your affidavit filed in this court, dated November 3, 1943, and directing your attention particularly to that portion of the affidavit wherein it is stated that on March 28, 1943, at or about 10 a. m. of said day, "I told Oscar Cummins that I had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it," and particularly directing your attention—well, I had better read it all so you will get it clearly—reading from the affidavit: "That I heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it. Oscar Cummins stated that he hadn't heard anything about it, but that PRC, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him. He asked me what had disturbed me about it and I replied that I wasn't disturbed, but that I had wanted to know if anybody had suggested to M-G-M that Cummings' suspension had been terminated." On March 28, 1943, was Robert Cummings on suspension? A. No. [188]

(Testimony of Edward Muhl)

Q. Was he on the payroll?

A. He was on the payroll at that time, in that period, around that period.

Q. Did you yourself dictate this data? A. No.

Q. You, however, did read it before you signed it?

A. Yes.

Q. The affidavit was prepared by whom?

A. Ben Erlich.

Q. An attorney at the studio? A. Yes.

Q. Did you give him all of the information contained in here, or did you make any suggestion to him? Did you give him all of the information contained in this affidavit?

A. I either gave him the information or asked that he consult the files with reference to certain facts and dates which should be a part of that instrument.

Q. Now, it appears that—

The Witness: May I have Plaintiff's Exhibit 2, please?

Q. —in addition to the telephone calls that you told us about this morning on direct and cross examination, there were some other conversations? A. Yes.

Q. Before you testified this morning had you consulted your secretary with respect to any other dates than those you testified about this morning? [189]

A. No, I didn't.

Q. Was your testimony this morning your best recollection at that time? A. Yes, sir.

Q. Can you recall any conversations between the period of April 13, 1943, and June 3, 1943, on any other subject other than that discussed by you this morning?

A. I have a recollection, which has been reinforced from an examination of the file—

(Testimony of Edward Muhl)

Q. What file do you refer to?

A. —our studio file there, copies of letters and so forth, that the conversation or conversations that took place on the 14th were relative to a question of some compensation that it was contended was due Mr. Cummings.

Q. Did you turn that matter over to someone else?

A. Mr. Ward handled the matter ultimately to its conclusion, yes.

The Court: May I interrupt? You used the expression "the 14th." To what month do you refer?

A. April 14th.

Q. By Mr. Cooper: Can you recall any other subject matter that you discussed in any of these conversations, other than that?

A. I had reference previously to a conversation relative to a proposal for us to accept something less than our rights under the then-current contract. [190]

Q. Taking into consideration the information you received from Bob Speers with respect to this telephone conversation with Robert Cummings on April 5th, the notice sent to Robert Cummings on April 10th, the fact that he did not appear on April 12th, and from all of the conversations you had with Oscar Cummins, did you still believe, between the period of April 12, 1943, to and including the receipt of the notice of May 29th, that he was devoting one hundred percent of his time to the Civil Air Patrol and would not be available to you for services?

(Testimony of Edward Muhl)

Mr. Roth: That is objected to, your Honor, as calling for an opinion of the witness as to his state of mind, and asking the witness to decide one of the questions which the court has to decide in this case.

The Court: I think we indicated yesterday that, outside of a criminal case, where a man's intent is involved, he may not answer a question like that.

Mr. Cooper: I understand that, but I still respectfully disagree with the court.

Mr. Roth: I take it that the objection is sustained?

The Court: Yes.

Q. By Mr. Cooper: Did anything come to your knowledge between April 12, 1943, from any source whatsoever, between April 12, 1943, and May 29, 1943, that Robert Cummings was ready, able and willing to perform the services under his contract? [191]

Mr. Roth: I object to that on the ground that it calls for a conclusion of the witness and asks this witness to decide the question the court is going to have to decide as a matter of law.

The Court: Let me interrupt to say that I am inclined to think that it is a short-cut.

Mr. Cooper: It is a short-cut, for this reason: There are to be other conversations, if your Honor please, and I don't know what all of them were, and I don't know what may come up, and for that reason, if your Honor please—

The Court: It seems to me that this is one of the principal probative facts which will require a finding. I am

(Testimony of Edward Muhl)

unable to see upon what basis the witness should be allowed to determine it.

Mr. Cooper: That is a very good suggestion, I believe.

Q. By Mr. Cooper: During any of these conversations between April 12, 1943, and May 29, 1943, did Oscar Cummins or Robert Cummings tell you that he was willing to work? A. No.

Mr. Roth: That is objected to as incompetent, irrelevant and immaterial, and outside the issues of this case, and not proper redirect examination, and it calls for the opinion of the witness on a question of law.

The Court: I think, strictly speaking, the interrogation is not redirect, but I am prepared to allow counsel to reopen the direct examination, and I think it may fairly be [192] said to ask the witness whether, in the course of any of these conversations, either the plaintiff or Mr. Oscar Cummins stated in words or in substance that the plaintiff was willing to work for the defendant. There might be other criticisms, but I think, having gone over the ground as extensively as counsel have, that I should allow that.

Mr. Cooper: I think there is an answer already in to that question.

(Record read by the reporter.)

Q. By Mr. Cooper: In substance or in effect?

A. No.

Mr. Cooper: I think that is all.

Mr. Roth: No further questions.

Mr. Cooper: Mr. Ward, please. [193]

EMMETT WARD,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Emmett Ward.

Direct Examination

Q. By Mr. Cooper: Mr. Ward, what is your business or occupation? You are employed by whom?

A. Universal Pictures Company, Inc.

Mr. Roth: I don't hear you.

A. Universal Pictures Company, Inc.

Q. By Mr. Cooper: How long have you been employed by Universal? A. Since 1934.

Q. In what department of that corporation?

A. Since the start of my employment—

Q. For the past couple of years?

A. In the contract department.

Q. The head of that department is whom?

A. Mr. Muhl.

Q. Do you know Oscar Cummins?

A. Yes, I do.

Q. How long have you known Oscar Cummins?

A. I would say four or five years.

Q. Have you seen him in the studio frequently?

A. Yes. [194]

Q. Did you know him as the agent of Robert Cummings, the plaintiff in this case?

A. I knew him as the representative of Robert Cummings, the agent.

Q. Have there been any occasions that you know of when Oscar Cummins came to you respecting the non-

(Testimony of Emmett Ward)

payment of salary under his contract of November 21, 1938? A. Yes.

Q. Do you recall any specific occasions?

A. I recall one occasion specifically, although I can't recall what date it was.

Q. Do you recall approximately how long ago it was?

A. Oh, a year or so ago. I recall that he came into the office and said that he had been to the cashier, and there was a bonus check, a salary check, that was not ready, and asked if I would locate it for him.

Q. What did you do?

A. I called the paymaster and started to tracing the check, and he said it had been made out late. The checks, I believe, at that time were presently in the controller's office waiting for signature, and Mr. Cummins sat in my office until the check was sent for, and I handed it to him.

Q. What did he do with it?

A. He stood up and folded the checks and put them in his pocket, and shook hands and thanked me for getting them for him. [195]

Q. On or about April 14th or 15th of this year did you have some discussion with Oscar Cummins about a check that was or was not due to Robert Cummings?

A. Yes, I recall such a case.

Q. Was that a phone conversation or a conversation personally?

A. As I recall, it was a telephone conversation.

Q. Do you recall what date it was?

A. Not exactly, but I recall that it was pay day, so it must have been Wednesday.

(Testimony of Emmett Ward)

Q. After having that conversation with him did you dictate a letter?

A. Subsequent to the conversation, yes, but I think it was the day after the conversation.

Q. For the purpose of refreshing your memory as to the date, I show you a letter. I will first show it to counsel. I show you a carbon copy of a letter, and ask you if that refreshes your memory as to the date?

A. Yes.

Mr. Roth: We will stipulate that the letter may be read in evidence.

Mr. Cooper: Thank you. It is dated April 15, 1943:

"Mr. Oscar Cummins,
9441 Wilshire Boulevard,
Beverly Hills, California.

Dear Oscar: [196]

Enclosed I am sending you our check in payment of Robert Cummings' salary for two days of last week. We are very sorry that this error in payment of Mr. Cummings' salary took place.

Sincerely yours,

Emmett P. Ward,
for Universal Pictures Co., Inc."

Q. Now will you relate the conversation that you had with Oscar Cummins on the telephone preceding the sending of this letter of April 15th?

A. As I recall it, he called to tell me that Robert Cummings' salary check for the preceding week had been picked up and it was two days short, and would I check it and find out why, and I said that I would.

(Testimony of Emmett Ward)

Q. By Mr. Cooper: Had you in fact ordered Bob Cummings suspended before April 12, 1943?

Mr. Roth: Objected to as incompetent, irrelevant and immaterial, and no proper foundation laid, and no showing that this witness had authority to suspend him.

The Court: I think he may testify as to what he undertook to do.

Mr. Cooper: Yes.

A. I had notified the payroll to take him off salary, that he was going on suspension.

Q. On what date was that?

A. The suspension was to commence from the 9th of April. [197]

Q. That was the date you dictated that letter of April 9th that is now in evidence?

A. I believe so. It was a letter of April 9th.

Q. When Oscar Cummins phoned you did you make some change with respect to his being on suspension as of the 9th?

A. Between the time I told the payroll he was on suspension as of the 9th and the time Oscar Cummins phoned me, there had been a change made in the plan for the suspension, which I neglected to notify the payroll of.

Q. As a matter of fact, he was not put on suspension dating as of the 9th? A. No.

Q. And you paid him his check for the 9th?

A. And 10th.

Q. And 10th? A. Yes.

Q. That was the check referred to and enclosed in the letter of April 15th? A. That is correct.

Mr. Cooper: I do not want to repeat something, but, with the court's permission, I would like to ask a question.

(Testimony of Emmett Ward)

Q. Were you present at a conversation in Ed Muhl's office, at which time there was present Oscar Cummins, on or about the 3rd day of June, 1943?

A. I was present at such conversation, but the exact date I don't recall. [198]

Q. Do you have an independent recollection of the substance of that conversation? A. Yes, I do.

Q. Will you state the substance of that conversation on June 3rd?

A. Well, as I recall it, I came in a little late on the conversation, and, briefly, Oscar Cummins said he wanted to try and arrive at some kind of a compromise settlement of the difficulties presently existing between the company and Robert Cummings on the suspension.

Q. Is that all that you can recall of the conversation at this time?

A. Well, he did mention that he had been consulting another attorney besides himself and his brother, and that they had been advised that there had been a breach of the contract, and Bob had a good legal action for voiding the contract.

Q. Anything else that you recall?

A. Not offhand.

Q. If I showed you a memorandum of that conversation of June 3rd, do you think that might refresh your recollection as to the subject matters discussed?

Mr. Roth: If the court please, the witness testified from his memory. Mr. Muhl made the memorandum, and if counsel is expecting to ask the witness to testify, we object to the memorandum being shown to the witness. [199]

Mr. Cooper: It doesn't make any difference.

The Court: I think the objection is well taken.

(Testimony of Emmett Ward)

Q. By Mr. Cooper: Is there anything else that you recall that occurred in that conversation?

A. Well—

Q. Do you recall the word “entrap” being used?

A. Yes.

Q. Tell us what was said about that.

A. I think Mr. Muhl told Oscar Cummins that—I forget who it was—but somebody had deliberately set about to legally entrap the studio into a position where we would have to make some compromise on the contract that Mr. Cummings had with the studio.

Q. What did Mr. Oscar Cummins reply to that, if you recall?

A. I think he denied having anything to do with it himself.

Mr. Cooper: You may cross examine.

Cross-Examination.

Q. By Mr. Roth: Mr. Ward, this incident you referred to in your direct examination, which took place a year or more ago, when Mr. Cooper asked you about the check or checks that were due to Robert Cummings, are you sure that was not just a bonus check?

A. I am quite sure it was two checks, and involved a bonus check and a weekly salary check. [200]

Q. Do you remember with respect to what picture the check was involved? A. No, I don't.

Q. Was it a phone call, or did he come there?

A. Mr. Cummins was in the office at the time.

Q. And you talked to the paymaster, or sent somebody and got hold of the checks?

A. Yes; I located the checks.

Q. Did you look at them before you handed them to Mr. Cummins?

(Testimony of Emmett Ward)

A. I probably gave them a very cursory inspection.

Q. Was that the only time that Mr. Cummins spoke to you about a check?

A. As I recall, that occurred quite often. That is just one incident that stands out in my mind.

Q. Did it ever happen before in respect of a salary check, as distinguished from a bonus check?

A. I would say it did.

Q. But you have no recollection of when?

A. I have no recollection of any specific incident, no.

Q. Would you say it did between the time you gave him the salary check and the bonus check and April 10, 1943?

A. I believe it probably did. I would say it did.

Q. Between the time that you testified that you handed him a salary check and a bonus check and April 10, 1943?

A. I think I answered the question. I understand by [201] his question he means, did Mr. Oscar Cummins, between the incident I related of handing him a salary check and a bonus check and April 10, 1943, if, at any time, it occurred again that he came in to ask me for a check for Bob.

Q. Is that correct?

A. And my answer was that, to the best of my recollection, it did. Quite often Oscar would be in talking to Ed Muhl, and would come out into my office and say, "Get me Bob's check. See if you can get me Bob's check." It may have been a day late from pay day, or something like that.

Q. You mean it happened in that manner?

Q. Quite often it happened that way.

Mr. Roth: That is all.

Mr. Cooper: That is all. Mr. Kelley, please. [202]

DANIEL KELLEY,

a witness heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

Direct Examination

Q. By Mr. Cooper: Mr. Kelley, yesterday afternoon Judge Roth asked you a question with respect to the date of a conversation you had with Benny Thau and Mr. Fred Datig. It is my recollection that you testified that it was on or about the 1st of June. Have you since refreshed your memory as to the actual date of that conversation? A. I have.

Q. Let me ask you this first: Is it a matter of practice in your own office, I mean your personal office, to make a record of certain telephone conversations?

A. Yes.

Q. And with whom or on what calls do you make such a record?

A. Because ninety percent of my business is done over the telephone, on contracts and business dealings, and I want a record of it so that I will have a thorough understanding of it afterwards.

Q. And do you have someone listen in on an extension wire?

A. I have my secretary take down transcriptions of the messages, so that there is no misunderstanding. I make lots of contracts over the telephone or okay deals over the [203] telephone. That is the reason why all telephone calls to my office are taken down by my secretary.

Q. Was that done in the case of your conversation with Mr. Fred Datig and Mr. Benny Thau?

A. It was.

(Testimony of Daniel Kelley)

Q. I show you a transcription of your telephone calls, in question and answer form, and, directing your attention particularly to the date, on what date did you have phone conversations with Mr. Fred Datig?

A. One on May 27th, and one on May 28th.

Q. And with Mr. Benny Thau?

A. May 28th.

Mr. Cooper: That is all. You may cross examine.

The Court: Just a moment. Mr. Reporter, will you read the last two questions and answers?

(Record read as requested.)

Mr. Cooper: One other question. May I inquire of the court and counsel: It is my recollection, if your Honor please, that when this witness was on the stand yesterday on cross examination counsel inquired of the witness as to the substance of the conversations with either one or both of these gentlemen. Does your Honor have a recollection of that, or do you remember it?

The Witness: I do. He asked me if I had a conversation with anybody away from the studio, and if I was asked if we would lift the suspension, and if this was during the time [204] of the making of "Fired Wife," and I said no, it was not while we were making "Fired Wife."

Mr. Cooper: If your Honor please, the point of my inquiry is this: It is my recollection, although I am not positive, that counsel inquired of the witness as to the substance of these conversations, and if I am right in that recollection it is my desire now to offer the entire conversations, as the witness has now refreshed his recollection particularly as to specific details.

(Testimony of Daniel Kelley)

Mr. Roth: Of course, the witness is partly right. What I did ask the witness in several forms was, and in response to one or two questions, the witness specifically said, "In that form, no. If that is the question, the answer is no." That is the effect of what he said. But my question was not as to "Fired Wife." My question was, if this witness had at any time been asked by anyone generally with respect to the services of Robert Cummings, whether he had been asked by anyone connected with a studio whether Universal would lift the suspension of Robert Cummings if they could persuade him to do a picture for them. That was the effect of my question, and the witness answered the question no. Anyway I put it, he answered it no.

Mr. Cooper: If your Honor please, it would be my first suggestion to ask the reporter to read back that portion of it, but in the interest of time I offer this suggestion, [205] that I offer these three conversations in evidence as redirect examination, provided my recollection of counsel's cross examination is correct, and that I offer it in evidence subject to the reporter checking that situation.

The Court: Well, in order to avoid having this witness return, and having in mind that one or both counsel will check with the reporter's notes, could the memoranda be left here, so as to render it unnecessary for the witness to return?

Mr. Roth: I think so. I am not at this time stipulating that I will not raise other grounds of objection.

The Court: No, I am not asking that, but it occurred to me, for example, that if the objection is ultimately overruled, the witness could be asked to relate the conver-

(Testimony of Daniel Kelley)

sation, upon the basis, apparently, that his answer would be as set forth in the memorandum, and for that purpose it would be unnecessary to recall him.

Mr. Roth: Yes, your Honor, except for this one thing: In respect of other memoranda, I think, by reason of my stipulation, the memoranda have been permitted to be read into evidence as the testimony of the witness, on the theory that the witness would testify that it was his memorandum. Generally speaking, I don't understand that that is the proper procedure. If memoranda have been made after the date of a particular conversation and the court sees fit to grant permission, the witness may use the [206] memoranda to refresh his recollection and testify to the conversation, but that doesn't mean that you may substitute the memoranda for his testimony.

Mr. Cooper: I agree that that is the rule.

The Court: I don't think there is any quarrel on that point.

Mr. Roth: The only reason I bring that up here is that with the other witnesses I have been satisfied to proceed in that manner. I am not satisfied, and my mind isn't made up on the subject as yet, as to whether or not I would permit, without objection, the reading of this memorandum into evidence in lieu of having Mr. Kelley testify to what took place. I might.

Mr. Cooper: I would suggest this procedure, then, if your Honor please.

The Court: Let the witness remain until the mid-afternoon recess, and plaintiff's counsel might examine the memoranda and then state his position.

Mr. Roth: That is all right. I would be glad to do that.

(Testimony of Daniel Kelley)

Mr. Cooper: Thank you, your Honor. I would have no further questions other than those to address to the witness.

Cross-Examination

Q. By Mr. Roth: You testified that it was your custom to have telephone conversations transcribed when you had matters relating to contracts to discuss. [207]

A. Business matters.

Q. And that ninety percent of your conversations over the telephone pertained to contract matters?

A. To business.

Q. Are ninety per cent of your telephone conversations transcribed?

A. All of them applying to business are transcribed. No personal calls are transcribed.

Q. All of your telephone conversations pertaining to business are transcribed? A. Yes.

Q. Did you mean for us to understand that ninety per cent of your conversations on the telephone do pertain to business? A. No, I didn't say that.

Q. That is the reason I am asking you now.

A. No.

Q. What percentage of your telephone calls do pertain to business?

A. I wouldn't know, because one day it will be more than it will another day. Some are personal calls and some are business calls.

The Court: Let me interrupt to say that there is something confusing about one of your answers. Did you use the expression "ninety per cent"?

A. I said something about ninety per cent of my [208] contracts are O.K.'d over the telephone. I think ninety

(Testimony of Daniel Kelley)

per cent of the contracts are ultimately O.K.'d on the telephone. I think that is what I said, because I get an O.K. and call up and give an O.K., because I have to have an approval too.

Mr. Roth: If your Honor please, I didn't write the witness' testimony down as he gave it, but my recollection is that it was broader than that.

The Court: I was under the same impression, and that is why I asked the witness there what he meant, and the witness has now given another explanation.

Mr. Roth: It is my recollection that the witness testified that ninety per cent of his telephone calls related to business.

The Court: I thought I had so understood, and then when the witness last answered plaintiff's counsel he didn't seem to mean that.

Q. By Mr. Roth: Let us put it this way so that we will get your testimony in the record as you would have it. What percentage of your telephone calls do relate to business?

The Court: In the course of a month or six months' period?

A. I would say ninety per cent of my calls are business.

Q. By Mr. Roth: Are ninety per cent of your calls transcribed? [209] A. They are.

Q. Who transcribes them?

A. Two secretaries, either one or the other.

Q. In other words, every time you get on the telephone a girl listens in and takes down the conversation?

A. That is correct; if it is business, she takes it. If it is personal, she does not.

(Testimony of Daniel Kelley)

Q. Do you have a file of your telephone conversations? A. I have.

Q. Do you have it here?

A. A file of all of them?

Q. Yes. A. No, I haven't.

Q. Do you have a file of the telephone conversations separately by months?

A. They are filed in a looseleaf book file, and when that is filled she takes it in on my private desk. Those telephone conversations are in my desk.

Q. You call the girl in after you have completed the telephone conversation? A. I do not.

Q. Do you know whether the girl writes it up immediately after she listens in on the telephone conversation? A. That I don't know.

Q. Do you know when the girl types up the conversation, with respect to the time—that is, assuming that you have [210] a telephone conversation now, when would you expect the girl who listens in to actually type it up?

A. I think she types it up immediately after, if she has the time.

Mr. Cooper: The girl is here, if that will help you any.

Mr. Roth: Yes. I asked that because I saw Mr. Kelley come in with a young lady, and I am, of course, examining Mr. Kelley now and getting his knowledge of the circumstances and what is done.

Q. By Mr. Roth: Are these transcriptions submitted to you after they are written up? .

A. They are not.

(Testimony of Daniel Kelley)

Q. You never see them?

A. I never ask for them unless something comes up for inspection, or very seldom do I ask for them.

Q. In other words, they are written up and filed away without being shown to you? A. Yes.

Q. And you do not refer to them unless, in a situation like this, it occurs to you or counsel to look up certain dates, to see whether or not you had a telephone conversation? A. That is correct.

Q. When did you look for the memoranda which are dated respectively May 27th and May 28th?

A. Last night when I got back to the studio. [211]

Q. Did you make the search yourself?

A. I did not. Mr. Erlich and my secretary, when I was out of the office.

Q. Then you haven't seen these memoranda since the time you had the telephone conversations?

A. I don't believe I have, until last night.

Q. Until last night? A. That is correct.

Mr. Roth: If the court please, I respectfully submit that the answers of the witness show that this memoranda cannot be used, and it is not admissible even for the purpose of refreshing his recollection.

Mr. Cooper: May I take the witness, your Honor?

Mr. Roth: On this phase of the examination, for the purpose of having the court determine my objection, I think we have established that this witness never saw the memoranda after it was made and had no opportunity to check it back, that it wasn't made under his direct supervision and under his control, and that he is looking at the memoranda for the first time about a conversation which took place several months ago. And the entire reason

(Testimony of Daniel Kelley)

behind the rule is that it shall be made by the witness and that he has had an opportunity to check it at the time it was made.

The Court: I think I should allow opposing counsel a chance further to interrogate the witness.

Mr. Cooper: I would like to make this observation first, [212] that I do not agree with counsel's statement of the rule. For example, at the present time this reporter is taking down the testimony of the witness and the remarks of counsel and the court, and neither the court, and certainly not the witness, has an opportunity to correct it; nevertheless in any subsequent proceeding the witness would be permitted to refresh his memory from a transcript of it.

Q. By Mr. Cooper: If you looked—I think you have looked at those three transcripts—would that refresh your recollection as to the conversations you had with Mr. Datig and Mr. Thau respectively?

A. They do.

Mr. Cooper: That is the only question I have, your Honor.

The Court: Having in mind that we have reached this stage in the interrogation of the witness as far as these conversations with Messrs. Thau and Datig are concerned, it would seem that all that remains to be determined is whether or not the witness may refer to them for the purpose of refreshing his recollection. I would like to suggest that counsel might proceed to at least complete the balance of the cross examination, leaving for further determination whether or not the witness may resort to the memoranda.

(Testimony of Daniel Kelley)

Q. By Mr. Roth: Did you know, when Mr. Datig called up, Mr. Kelley, that he was going to discuss a matter of business with you? [213]

A. That is the usual procedure when I get a call from Mr. Datig, from another studio, that we assume that it is going to be business.

Q. Every time someone calls you from another studio, you assume that it is business, and you have the girl get on the telephone and make a transcription of the conversation?

A. That is left to the discretion of my secretary, as to whether she makes it or not. If it is personal, she doesn't take it, but I have left that up to her.

Q. You have your secretary, or one of them, come on the telephone and listen with you all the time, and if she decides that it is a personal conversation, she makes no memoranda of it, and if she decides it is a business conversation she does make a memorandum of it?

A. I would say that is the rule.

Q. Have you and your secretary discussed at any time at what part of the conversation she is to make up her mind whether it is business or personal?

A. I haven't, no, sir.

Q. In other words, you leave it entirely to your secretary from the beginning to the end of the conversation?

A. I do.

Mr. Roth: Could I ask counsel to bring in for my inspection the record of telephone calls, incoming and outgoing, between Mr. Kelley and anyone, for the month of May, [214] 1943, and the records of the transcriptions made of telephone conversations during that month?

(Testimony of Daniel Kelley)

Mr. Cooper: I would like to inquire first. I assume they have it.

The Court: You might do that.

Mr. Cooper: Counsel, you stated that you would be happy to get that. They do not have a record of outgoing calls, but they have a record of all incoming calls.

Mr. Roth: Well, I will take what records they have, just for my inspection, for that particular month. I would like to ask Mr. Kelley this additional question.

The Witness: Can I ask you a question?

Mr. Roth: I don't mind, if the court doesn't mind.

The Court: I am not sure what your purpose is.

The Witness: I want to ask whether he wants to know what the conversations were that I had, that I had transcribed.

The Court: You want to know the purpose of making the inspection?

The Witness: No. I would like to know whether he wants to learn the conversations I have had, all the conversations which I had. I want to know if that is his purpose.

The Court: Merely to find out what was transcribed, what you said?

The Witness: Yes. [215]

Mr. Roth: Obviously, your Honor, I can answer that. I haven't the slightest curiosity or interest in Mr. Kelley's business. My sole purpose in making the check is to see

(Testimony of Daniel Kelley)

how accurate and complete it is and whether or not it coincides with the witness' oral testimony.

The Court: Does that clear the matter in your mind?

The Witness: Well, there are conversations every day which are taken down and transcribed, for the last three or four years, in my office, and I was just wondering whether it was something that would be made public, as far as the conversations were concerned.

Mr. Roth: I can see that there is some point in the witness' suggestion. There may be confidential matters there that he wouldn't want anyone to see or disclose, and I haven't any desire to pry into any business of Mr. Kelley or Universal. My sole purpose is the one I stated. Suppose we do this, your Honor. During the noon hour, the noon recess, I will give this matter some thought, and I may withdraw the request.

The Court: That is, the mid-afternoon recess?

Mr. Roth: Yes, the mid-afternoon recess.

Mr. Cooper: She is calling now to get them ready.

Mr. Roth: I have no further questions from this witness.

Mr. Cooper: I think that is all. I would like to call Mr. Robert Cummings under Section 2055.

The Court: May I suggest to counsel that, under Rule 43, [216] subdivision (b) of the Federal Rules of Civil Procedure, you have all the leeway that Section 2055 provides.

Mr. Cooper: Thank you, your Honor. I will be very happy to call him under that section. [217]

ROBERT CUMMINGS,

the plaintiff, a witness heretofore duly called in his own behalf, upon being called as a witness for defendant, under Rule 43, subdivision (b), testified as follows:

Direct Examination

Q. By Mr. Cooper: Mr. Cummings, when did you first join the Civil Air Patrol?

A. I can't give you the exact date, Mr. Cooper. I should say I sent the forms in to Washington some month and a half or two months after Pearl Harbor.

Q. You have engaged in active service in the Civil Air Patrol, have you not? A. No.

Q. None at all? A. No.

Q. Have you done any flying at all in Los Angeles County? A. No.

Q. Were you permitted to fly in Los Angeles County?

A. Yes.

Q. Have you done any flying outside of Los Angeles County? A. Yes.

Q. When was the last time you flew outside of Los Angeles County before, we will say, June 1st of this year?

A. Before June 1st of this year?

Q. Yes. [218]

A. I can't tell you. I could look it up.

Q. Let's put it this way: Where did you fly outside of Los Angeles County?

A. Where I have flown prior to June 1st of this year?

Q. Yes.

A. Las Vegas, Nevada, Quartzsite, Arizona, Phoenix, Arizona. That is all I recall.

(Testimony of Robert Cummings)

Q. Can you recall when it was that you were flying in Quartzsite, Arizona, approximately what month? Can you fix the month?

A. No, I can't definitely fix the month. I could look it up in my aircraft log, however, and in my pilot log, which states the days, hours and minutes I flew.

Q. Do you recall flying during the month of May?

A. I can't definitely say that I do.

Q. Do you know where you were between, say, the first of May and the first of June?

A. I can't say right now. I could tell you by my aircraft log.

Q. Your aircraft log is where?

A. That happens to be at Oxnard, California.

Q. Could you call there and get that information?

A. No; there is no way I could phone. I would have to go there and get the log and bring it back.

Q. Were you in Los Angeles on the 10th of April, 1943? A. I couldn't swear to it. [219]

Q. Or on the 11th of April, 1943?

A. That I couldn't swear to either.

Q. Or on the 12th of April, 1943?

A. That I couldn't swear to.

Q. On the 18th day of May, 1943?

A. That I don't remember.

Q. The 19th? A. I don't remember that.

Q. The 20th?

A. The only way I could tell would be to look it up in the aircraft log, and I could tell where I was, and what ship I was flying, and where, on that day.

Q. Were you in town on May 29, 1943, in the town of Los Angeles? A. That I do not remember.

(Testimony of Robert Cummings)

Q. Did you have a conversation with Oscar Cummins at any time on the 29th of May, 1943?

Mr. Roth: That is objected to incompetent, irrelevant and immaterial, and asking for a confidential communication.

The Court: I think the question, in its present form, is purely preliminary.

Mr. Cooper: That is all it is, if your Honor please.

The Court: And he may answer.

Mr. Cooper: You may answer the question.

The Witness: Would you state the question again?
[220]

Mr. Cooper: Will you read it, please?

(Question read by the reporter.)

A. It is very possible, but I couldn't recall.

Q. By Mr. Cooper: Do you recall whether you were in Los Angeles on May 29, 1943?

A. I am sorry, I don't.

Q. For the purpose of refreshing your recollection—it seems as though we are refreshing everybody's recollection—I show you a telegram. Counsel, you have seen this telegram?

Mr. Roth: Yes.

Q. By Mr. Cooper: I show you a telegram dated May 29, 1943, and ask you if you have ever seen—I will withdraw that question. I will ask you to read the telegram. A. Aloud?

Q. No,—to yourself.

Mr. Cooper: That, if your Honor please, is the notice of May 29th, which the witness is referring to.

Mr. Roth: It is admitted that it was received. I don't see the materiality of it.

(Testimony of Robert Cummings)

The Court: I think counsel is entitled to lay the foundation for another question, if he has one.

Mr. Cooper: I have, your Honor.

A. Yes, sir.

Q. Now, did you discuss personally and in the physical presence of Oscar Cummins that notice of May 29, 1943, in [221] Los Angeles? A. This telegram?

Q. Yes. A. Yes.

The Court: I don't understand the theory upon which the question is asked.

Mr. Cooper: I will withdraw the question. I will put it this way.

Q. Were you in Los Angeles on May 29, 1943?

Mr. Roth: That is objected to.

The Court: I think the witness has told us twice that he cannot recall whether he was in Los Angeles.

Mr. Cooper: If your Honor please, that is correct, but I am not necessarily bound to accept that. I have shown the witness a telegram purportedly signed by him on May 29th, and asked if that refreshes his recollection, and then will ask him the question if he now knows whether or not he was in Los Angeles on May 29th.

The Court: Put in that way, he may answer. Does that help to refresh your recollection as to where you were on May 29, 1943?

A. I presume that I had—I was in the office of Oscar Cummins on that day.

Q. By Mr. Cooper: As a matter of fact, Mr. Cummings, you were not in Los Angeles during any period between May 18th and May 29th, 1943, were you? [222]

A. That I can't say. By way of explanation, I am a flyer, and we move around pretty fast sometimes.

(Testimony of Robert Cummings)

Q. That is right.

A. And it is very difficult to ascertain where I was on any day, or at any hour or time, because, when you are flying, your mind is so taken up with that particular phase of the work, and it is very possible that I could have been in Quartzsite, Arizona, and in Oscar Cummins' office on the same day, or in any part of California, for that matter.

Q. Let me ask you this: For how long a period of time were you absent from Los Angeles, we will say, at any time during the month of May, continuously?

A. At the present time I can't recall having been absent from California for more than three or four days at a time.

Q. From Los Angeles.

A. From Los Angeles, California, or this vicinity, for more than three or four days at a time.

Q. Now, it had been your desire for some time, had it not, before April 5, 1943, to be a member of some branch of the armed forces of the United States, the military forces of the United States?

A. I felt that I was doing quite a job in cooperating with the military forces of the United States, in that I was a squadron commander in the CAP, and therefore my duties were [223] working in conjunction with the military forces of the United States.

Mr. Cooper: I will move to strike the answer as not responsive.

(Testimony of Robert Cummings)

Q. By Mr. Cooper: Do you recall having quite a number of conversations with Bob Speers about your desire to join up?

A. Bob Speers and I talked in the office at length about whether or not the CAP was such an organization that, being a member of it, I could make pictures, and I stated to Bob Speers that it was, that I had joined the CAP in good faith for the duration, but that in no way did that hold me to a definite duty with the CAP at any time. In other words, it was, so to speak, like volunteer air raid warden of the sky—I believe I made some remark like that—and it was purely voluntary, and that I could do this duty, because of the fact that I was qualified as a professional flyer and a teacher of navigation and meteorology, and various subjects of that kind, and various aircraft subjects. I stated to him that I was qualified to do this, and therefore I felt that all the spare time I had should be spent in doing it. I talked to him at length about it. We talked many times about it.

Q. In other words, Bob Speers was a friend of yours?

A. A very good friend, yes.

Q. And you went out to eat on occasions together, and [224] things of that sort?

A. We had done a great deal of that a few years before, but after Robert Speers became more entangled in his work at Universal he had been too busy for such things, and I doubt if we had been together much.

Q. As a matter of fact, you didn't have any hesitancy in imparting your feeling to him as to your duty as an American citizen? A. None whatever.

Q. As a matter of fact, you recall, in this conversation on or about April 3rd—can you fix the time when

(Testimony of Robert Cummings)

you had the last conversation with Bob Speers in his office?

A. I can't fix the date; I am sorry. The last conversation I had with him, you mean prior to—

Q. The last conversation you ever had with Bob Speers in his office at Universal.

A. I can't tell you the date; I am sorry.

Q. You recall, however—you have that conversation in mind, do you?

A. Yes; I did have a conversation with him. I think it lasted some three hours.

Q. You went to lunch and you came back and finished up the conversation?

A. That may be possible.

Q. And in that conversation didn't you tell Bob Speers that you were thinking about devoting one hundred per cent of [225] your time to the Civil Air Patrol? I am talking about the last conversation. I am talking about the last conversation you had with him at his office.

A. No. I did say this to Bob Speers: That since I was very disappointed in the way the motion picture "Fired Wife" had been handled prior to its starting date, I felt very much as though, rather than do a picture of that type, I would rather fly for Lockheed Air Terminal or Lockheed Aircraft Corporation or for the CAP, or do something more strategic than to make a motion picture which I felt was not strategic. And on that subject Mr. Speers said, "Well, don't you feel, Bob, that this is a very important thing for the war effort? Don't you feel that in making pictures an actor like you, who can go out and make people laugh, that that is contributing to the war effort, and don't you think that this production is a picture

(Testimony of Robert Cummings)

that will be a comedy and a funny one?" And I said: "I am sorry, Bob, but I do not feel that way." And I said: "I feel that rather than waste my time—because I am a man of two professions—I am a professional flyer and a professional actor, and the services of fliers at this time are greatly in need, and rather than waste my time making a motion picture which I do not feel will do anything for the war effort whatsoever, I feel that I would rather make a better mousetrap by my labor, and I feel that rather than make such a picture I should fly for the CAP." [226]

Q. Didn't you say "for the duration"?

A. No, I didn't.

Q. Don't you recall his telling you at that time: "Bob, if you are going in for the duration, don't you feel that you could at least come and do this picture, that others have joined up before, and we have been able to get them to do a picture?"

A. On this specific occasion I believe I remember Mr. Speers saying: "Do you feel that you should stay in the CAP for the duration?" And I said, "I am in the CAP for the duration, but that has nothing to do with whether I do pictures or not. However, if at any time I wish to resign, I can."

Q. Did you tell him that on April 5th, whatever the date of that conversation was, being the last conversation you had with him?

A. I believe I did, because we spoke very frankly on all these things.

Q. Before this last conversation you had had many conversations, at least several conversations, with Bob Speers about your status in the CAP? A. Yes.

(Testimony of Robert Cummings)

Q. And isn't it a fact that it was before this last conversation that you told him that you could resign at any time you wanted to? Do you remember that question?

A. I don't understand that. [227]

Q. Before this last conversation—and may we just, for the purpose of designating it, call it the conversation of April 5th—you had had at least several conversations with Bob Speers before April 5th, on or about April 5th, about the CAP and you being in it and what you were doing; isn't that correct?

A. Yes; as friends we had talked about it.

Q. And that you enjoyed the work in the CAP?

A. Yes, very much.

Q. And, as friends, you discussed it? A. Yes.

Q. Wasn't it in the earlier conversations that you had with Bob Speers that you told him your status with the CAP, that is to say, that you could resign at any time you wanted to?

A. Well, I may have told him that earlier, but I certainly think we talked about it that very day.

Q. Didn't he on that occasion, April 5th, also try to prevail upon you to at least do this picture?

A. Oh, yes.

Q. And gave you many arguments about why you should?

A. We discussed it as friends, yes.

Q. Don't you recall his telling you about the Hollywood Victory Committee, what they thought about actors as morale builders?

A. Yes; we discussed the Hollywood Victory Committee, [228] as a matter of fact, at that time.

(Testimony of Robert Cummings)

Q. You heard his testimony with respect to that?

A. Yes; he told me at the time that he was a member of that committee.

Q. He told you in substance about the Hollywood Victory Committee about what you heard him testify to yesterday?

A. As a matter of fact, by way of explanation, I can even recall the conversation we had in regard to the Victory Committee.

Q. On this particular occasion? A. Yes.

Q. Do you want to relate it? Do you want to add to that which Bob Speers testified yesterday in connection with that subject matter?

A. It was only this, that possibly, without knowing the stand the studio would take on the matter, I had volunteered to go with the Hollywood Victory Committee show which was to travel through the Carribean, with Billy Gilbert and Desi Arnaz and a few other players that were going down to entertain the boys. Billy approached me on the subject and asked me if I could go. And I mentioned that to Bob Speers, because, when I had volunteered to go—in fact, I signed some papers for the F.B.I. concerning this matter—the Victory Committee had stated to me, it had expressed disapproval of my going, because they said that my studio would not allow me to go. And I mentioned to Bob at that [229] time about this; I said, "Bob, don't you feel that since you are on the Victory Committee, and I have volunteered to do this, and you think that these pictures are to be in the war effort—why wouldn't the studio, then, let me go and do that little show around the Carribean for six weeks, do my bit in that way, when I have practically nothing to do." And

(Testimony of Robert Cummings)

that is the way the conversation came up, to compare the Victory Committee's refusal to allow me to go with the motion picture.

Q. At the conclusion of that conversation on April 5th—April 3rd, I should say—how did you leave the matter? What did you say to him with respect to whether or not you would or would not portray the role in "Fired Wife"?

A. I told Bob that it would be necessary, naturally, for me to talk to Oscar, which was always my habit.

Q. You told him that you would think it over, or words to that effect?

A. I told him I would talk to Oscar, which he knew, that I would talk to Oscar, and we would think it over.

Q. And you called him up following that conversation?

A. Either I called him or he called me; I have forgotten which.

Q. Will you relate that conversation when you called him up? A. When I called Bob Speers?

Q. That is right. Tell us what you said to him. [230]

A. I will see if I can remember all that conversation. I believe I related to Bob that, due to the fact that the motion picture "Fired Wife," which they offered me as my next vehicle, had been cheapened, I felt, from the original intent of the studio, apparently in good faith, but from a much higher class cast and a much higher class director, and that I felt that I would not do the production and would not play the part of "Hank" in "Fired Wife." And it was the first time, as I remember, that Bob and I ever had any words, and I believe he got a little angry at me, and he said that he felt that this was the wrong

(Testimony of Robert Cummings)

thing to do, that I was putting the studio in a terrific hole, and it was not the right thing to do. And I said: "Well, that may be, but I am in a terrific hole also, due to the fact that I was led to believe that we would have a very high class production there, with a very fine cast, which has definitely been cheapened." The director was one which I told Bob that he had commented himself that Charlie Lamont was not the director they originally wanted to use. And he said that he felt that Charlie Lamont was, however, a very capable director and he thought that he had done many, many pictures for Universal that were very funny, and that I should give him a break. And I said, "I have nothing against Charlie Lamont. I only don't like to work for him. And you and Eddie Muhl promised me that there would be no more crap," meaning that there would be no more poor pictures [231] handed to me or attempted to be handed to me. And at that time we became gentlemen, as I understood, in good faith. We met in Oscar Cummins' office and we talked over the entire—

Q. When was this?

A. That was at a prior meeting, and this was during the conversation I have explained.

Q. Maybe I misunderstood you. I thought this conversation, Mr. Cummings, which you were relating, was the telephone conversation? A. Yes.

Q. The last telephone conversation you had with Bob Speers?

A. Yes. I was relating this other conversation which took place in Oscar Cummins' office that was mentioned during this telephone conversation.

(Testimony of Robert Cummings)

Q. I see.

A. And I said: "I feel that I should not do the picture and I should not play the part." And I think Bob said: "Well, you know, of course, that this may mean a suspension." And I said, "If it does mean a suspension it will have to mean it, because I do not feel like playing the part."

Q. Was that the substance of the conversation, as you recall it?

A. As I recall it, that was the substance of the [232] conversation.

The Court: We will take a short recess.

(Short recess.)

Mr. Cooper: If your Honor please, during the recess, as your Honor suggested, the reporter found his notes and began to check them, but he has not gotten far enough to ascertain what the situation was, up to now, so I would like to inquire with reference to the situation with regard to Mr. Kelley.

Mr. Roth: As far as I am concerned, Mr. Kelley certainly need not remain here this afternoon. And I think I will have an answer for Mr. Cooper as to whether or not I will waive any objection I have to the admission of these transcriptions of conversations, shortly after adjournment. I just want to thing the matter over before I give a decisive answer.

Mr. Cooper: Then Mr. Kelley may be excused this afternoon?

Mr. Roth: As far as this afternoon is concerned, yes.

The Court: He may be excused.

Mr. Cooper: You also said that you would give us an answer as to whether or not you wanted all the transcrip-

(Testimony of Robert Cummings)

tions of those telephonic conversations which were taken down.

Mr. Roth: Yes, I will do that at the same time. I will be better able to say that then. [233]

Mr. Cooper: At least, you don't want them here this afternoon?

Mr. Roth: That is right.

Q. By Mr. Cooper: Mr. Cummings, you are familiar, are you not, with the rules and regulations of the Civil Air Patrol with respect to term of enlistment?

A. I was familiar with them. I have been out of that work for some time, actually.

Q. As a result of being an instructor in the Army Air Force, is that correct?

A. Yes. May I change that?

Q. Certainly.

A. I am not an instructor in the Army Air Force. I am an instructor for the Army Air Force.

Q. You were sworn in as such, were you not?

A. As an instructor?

Q. Yes. A. No.

Q. You do know it to be a fact, do you not, that a member of the Civil Air Patrol may be given active service for a month, two months, or for the duration of the war; isn't that true?

A. As it stands now, I do not know whether that is true or not.

Q. You were a member up to what time?

A. I should say up until about a month and a half or [234] two months ago.

Q. In other words, during all the times in controversy you were a member? A. Oh, yes.

(Testimony of Robert Cummings)

Q. And during the time you were a member that was the rule, isn't that true, that a man could join for active service for a period of a month or two months, or a specific period of time, or for the duration?

A. Yes. As a matter of fact, everyone who joins the Civil Air Patrol, I believe, joins the Civil Air Patrol in good faith for the duration, and he may be assigned to active duty. I believe the least that he could be assigned was one month, and, if he wished, he could be signed up for active duty for the duration. However, in actual practice, many of them who decided to go in for the duration in the anti-submarine patrol came back after a few weeks, sometimes after a month, sometimes after two or three months.

Q. Now, following your last conversation with Bob Speers in his office on or about April 3rd—the last one you had in his office—do you have that in mind?

A. Yes.

Mr. Roth: Except for the date.

Mr. Cooper: Except for the date. I understand that he doesn't concede the date.

Q. By Mr. Cooper: Is it not a fact that in the following phone conversation that you had with Bob Speers you told him [235] definitely that you had made up your mind not to do the picture, because you felt that it was your duty to give one hundred per cent of your time to war work, and therefore you were signing up with the Civil Air Patrol for the duration?

(Testimony of Robert Cummings)

A. That is not exactly what I said. I am quite sure.

Q. Did you say that in effect?

A. I said to Bob Speers what I had repeated to him on occasions when we had met in regard to the picture "Fired Wife," when I found out that the production was not what it had been represented to me to be, and I said to Bob Speers that rather than waste my time on what I deemed a B production, which Bob said was an A production many times—I said: "I do not feel that it is an A production; I think it will be a B production when it comes out, and rather than waste my time on such a production," which he knew, "I would rather fly for Lockheed bombers, testing, or fly for the Civil Air Patrol."

Q. You told him definitely that you would not do the picture, didn't you? A. I did; yes.

Q. You didn't tell him that you were going to devote a hundred per cent of your time to the war effort, in substance? A. That I didn't say.

Q. Mr. Cummings, I show you Defendant's Exhibit A for identification, and ask you if that is your signature?
[236] A. That is my signature.

Mr. Cooper: I now offer Defendant's Exhibit A, heretofore marked for identification, in evidence.

Mr. Roth: We make no objection.

Mr. Cooper: That is all.

The Court: It may be marked in evidence.

[DEFENDANT'S EXHIBIT NO. "A"]

Universal City, California

November 27, 1941

Universal Pictures Company, Inc.

Universal City, California

Gentlemen:

Referring to paragraph 15 of my contract of employment with you dated November 21, 1938 please be advised that all written notices which you are required or may desire to serve upon me under or in connection with said contract may be addressed to me at

c/o Oscar Cummins,
8511 Sunset Boulevard,
Los Angeles, California.

Very truly yours,

Robert Cummings.
(Robert Cummings)

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Deft's Exhibit No. "A". Date: Jan. 4, 1944, for Identification. Date: Jan. 5, 1944, in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [243]

(Testimony of Robert Cummings)

Cross-Examination

Q. By Mr. Roth: Mr. Cummings, did you ever sign up for active duty in the Civil Air Patrol?

A. No, I didn't.

Q. In conversations which you have had with Mr. Bob Speers in respect of your war service, did you ever have a conversation with him about your volunteering to serve as a pilot in the United States Army?

A. I am sorry. I couldn't get all of that.

(Question read by the reporter.)

A. I believe in the conversation that we had in his office the last day, which I believe was the one that lasted so long, it seemed to me several hours, I talked to Bob on the subject of how badly I felt that, because of my age, I was not allowed to enlist in any of the flying activities of the Army or the Navy. And Bob told me at the time, he said that I shouldn't feel bad about that, "because I think you are doing a swell job in what you are doing." He said, "However, it is the studio's policy to not try to influence an actor one way or the other. But why do you feel that you [237] should go into any one of these services?" And I said: "It isn't a question of going into them, but I feel very, very bad about it, that I cannot be accepted either as a cadet or in flying crews."

Q. How long had you been a member, a volunteer member, of the Civil Air Patrol?

A. To that date, from the time that my application was accepted and I received my identification card from the CAP. I can't say the exact date, as the identification card does not carry the exact date, but it was some, I should say, month and a half or two months, something like that,

(Testimony of Robert Cummings)

after Pearl Harbor that I joined. I wouldn't say "joined"—I sent in the application with the belief that it would be accepted.

Q. Was it approximately from January or February, 1942, up to the time you had this conversation with Bob Speers in his office, that you were a volunteer in the Civil Air Patrol? A. Yes.

Q. And during all that time you had been making pictures for Universal?

A. Yes; not all of the time.

Q. During part of that time, when they requested it, you had made pictures for them? Let me put it that way.

A. Yes.

Q. Did your voluntary duties with the Civil Air Patrol [238] interfere in any way with your right to make pictures?

Mr. Cooper: Pardon me just a minute, counsel. I am going to object to that, on the ground that it is immaterial, because I am afraid we are liable to get into some collateral matters on that question. I will withdraw the objection, but suggest that we are going to get into some collateral matters there.

Mr. Roth: Rather than take a chance on getting into collateral matters, I would rather put the question this way.

The Court: Let the answer go out.

Q. By Mr. Roth: Did you make pictures during the period of time that you were a volunteer member of the Civil Air Patrol? A. Yes, sir.

Q. You testified, in answer to questions by Mr. Cooper, that you had a conversation with Mr. Speers in

(Testimony of Robert Cummings)

his office some time prior to April 10th, but you were unable to fix the exact date; is that correct?

A. That is correct.

Q. Can you fix it in relation to the number of days prior to April 10th—two days prior to April 10th, or what?

A. I think it was probably within four or five days before April 10th. I can't remember the exact date. I think it was sometime in there. [239]

Q. How did you happen to go to the office of Bob Speers?

A. I don't remember exactly how I happened to go, whether Bob called and said that he wanted to talk to me—I think that was probably it, as I think back over the conversation that followed. I think Bob called me and told me that he wanted to talk to me about a production. And I dropped into his office quite often, because we were good friends, and I don't remember how this happened.

Q. At the time you went to his office and had this conversation, which you say took three or four hours?

A. I think that is correct.

Q. As nearly as you can, give the court the entire conversation from the time you came into Mr. Speers' office until the time you left, as well as you can remember it.

A. All three hours?

Q. As much as you can remember of the substance of the conversation.

A. As I said before, we were very good friends, and naturally there were many subjects discussed, on the war, when we thought we would win the war, and about navigation and things I was teaching, and various things that Bobbie Speers was interested in, in regard to my flying.

(Testimony of Robert Cummings)

because we had had numerous occasions to be interested in flying. And he was at one time my publicity man at Paramount, and we went back into the days when we were at Paramount, and [240] how, at one time, we had gone to Lindsay, California, to crown the Orange Queen up there. And after while we got down to the subject matter of why I was there. And Bobbie, I am sure, felt that he didn't want to hurt me by telling me what he was forced to tell me, as a man who works for Universal Pictures. And finally we got around to the subject matter of the production, which he had told me about sometime earlier, "Fired Wife," in which I was to play this part of "Hank." And he said: "Now, Bobbie, as I told you before, we are doing everything possible to make this one of the greatest productions we have made this year. It is going to be a big picture." And he said: "You said you liked the script." And I said: "Well, I didn't say exactly that I liked the script. I only said that if the script was to be produced under the circumstances that you mentioned before, I think it had a chance, and I was willing to use my time to make the production." And he said: "Now, you know we are going to now have to use Charlie Lamont for a director." And I think I stated about that, something about I didn't see what they had to use him for, because he is not a director, back and forth, and I said: "Please forgive me. I have nothing against Charlie Lamont personally, but I only feel that Charlie Lamont is not a man who is capable of directing a good picture, or at least in my opinion I thought so." And Bobbie said: "Now, Bobbie, I want you to think this over [241] carefully, because this is something that is important to me and it is important to you. It is the

(Testimony of Robert Cummings)

first time we have gotten down so that we could work on amicable terms about a production since before you and Dan Kelley didn't get along very well." And he said: "I have volunteered to always be the intermediary between you and Dan Kelley." And he said: "Now, this is the first time we have gotten together, and I want to make a go of it, and I know you want to make a go of it." And I said: "Yes, I want to make a go of it, but I am not going to sacrifice everything I have built up for years to make a production which I don't feel is of any value to me or to the public." And he said: "But it will be a good picture, Bobbie. I tell you the studio has good faith in this, and they believe it is going to be a good picture, and I believe they are sincere in it." And he said: "I know at times we have had difficulties and troubles, you and Dan have, and if you will listen to me we can get together and make a good production here." And I said: "Bobbie, I am willing to listen to you, but when you tell me that Charlie Lamont is the director, and now I learn for the first time that Charles Coburn, who was employed at the studio, is not going to be in the picture, and that the type of actress of Teresa Wright to play the leading lady, that the studio was going to attempt to put in the production, is now not going to be in it, and that, instead of Eddie Rochester Anderson playing the valet, [242] Mankan Moreland is going to play it, from now on, and, besides these last disturbing facts, I hear that Charlie Lamont is directing the picture, I don't feel that the production is going to be a big production, and I don't think the studio is acting in good faith. I think the only reason that I was told this information about all this fine cast

(Testimony of Robert Cummings)

and this director that was mentioned"—it was mentioned at the time that there would be a director comparable to the talent of Leo McCarey or Frank Borzage,—“and now, since these people that I consider very fine in the industry are not going to be in the picture, I think the budget has definitely been cheapened, and I think the shooting schedule will be definitely cut down, and I think the publicity budget of the picture will be cut down, and the fact that you offer Diana Barrymore is still no inducement for me to want to do the picture.” And Bobbie said: “I understand the way you feel,” and he said, “I know that many people in the industry do not consider Charlie Lamont a great director, but he is coming up, and I think in a few years he will be a really fine director.” And I said: “Well, in a few years, when he gets to be the director that you say he is going to be, I will be very happy to work with him.”

Q. Was anything said by Mr. Speers about the picture being one that you ought to do for the war effort?

A. No, not directly. However, Bobbie did say: “I [243] think you couldn’t do a greater job for your country than making a picture that is a funny picture and makes the boys in the camps laugh.” And I, to this, replied that I felt that if it were a picture that was definitely something that the government was inspired about and wanted it to be put on, and if it were something that was definitely a need for the war effort, and was not just a picture to make money for Universal and another so-called box office proposition, that I would be happy to do one for the government for nothing, that I didn’t care who played in the production or what it cost, if the government wanted me

(Testimony of Robert Cummings)

to do it, but that this was not the case, that it was a commercial proposition between Universal and the exhibitors and it had nothing to do with the war effort.

Q. Was anything said by Mr. Speers in that conversation, in any part of that conversation, about the possibility of your suspension?

A. At that time Bobbie and I were very friendly, and I know that he didn't want to rile me or upset me, because he just wouldn't do that. However, after that, I think he did mention, however, during the course of the conversation, that it would be a painful thing for him to see this first sort of reunion between himself and myself, which meant nothing to him actually in a monetary way, excepting his own pride, that he felt that he would hate to see it fail, and that such an act on my part of refusing to do the picture [244] might lead to a suspension.

Q. Did you make any comment on that?

A. I think I said that if it were necessary for me to be suspended because of such a production, that I would just go on and fly for Lockheed or for the Civil Air Patrol during the suspension, because I didn't feel that it was worth my time to waste it making a picture which was definitely crap.

Q. Was anything said by you or by Mr. Speers about talking it over with Oscar Cummins before you definitely refused to do the picture?

A. I mentioned, naturally, that I always talked everything over with Oscar before I did anything.

Q. When you met after that conversation with Mr. Speers, you had a conversation with Oscar Cummins in which you told him about your conversation with Bob Speers?

A. Sure.

(Testimony of Robert Cummings)

Q. How long after?

A. I can't say how long after. I imagine it was a few hours. I think I got him on the phone as soon as I got home that evening, and I believe that is when we talked. I couldn't swear to that.

Q. Without telling us about the conversation with Oscar, do you know whether Oscar Cummins, after his conversation with you, went to Universal to talk to Mr. Speers or somebody there? [245]

A. After his conversation with me?

Q. With you. Maybe I don't make myself clear. After you reported to Oscar Cummins the conversation you had had with Robert Speers, do you know whether Oscar Cummins went to Universal to talk to anyone at Universal?

A. That I am not sure about. I know he did go to talk with him about it and about the director.

Mr. Cooper: I move to strike the answer "he did go," as hearsay, and a conclusion of the witness.

The Court: It sounds like a good objection.

Mr. Roth: Yes, your Honor. As far as the conversation is concerned, it is a good objection, but it does show, of course, his contact, and it seems that it doesn't lie very well with counsel to make an objection on the ground of hearsay, because most of the evidence put in by the defense, except the conversation between Mr. Speers and Mr. Cummings, is hearsay.

Mr. Cooper: If your Honor please, I have great respect for counsel, but I do resent the suggestion that I have been offering evidence here which is not admissible under the rules of evidence.

(Testimony of Robert Cummings)

The Court: Let me see if we can't get at it in another way. Are you seeking to learn from the witness whether or not he was subsequently advised that Oscar Cummins had contacted Mr. Speers?

Mr. Roth: Mr. Speers or someone at Universal. [246]

The Court: I will allow that question.

Q. By Mr. Roth: Do you know whether or not Mr. Oscar Cummins went to Universal and saw someone at Universal with respect to this picture?

The Court: No. The question in that form is open to the criticism that has been interposed. I think it is proper to inquire of the witness whether or not he was advised and informed to the effect that his representative had gone to Universal to contact someone there, one of the officials.

Mr. Cooper: May I inquire of counsel, through the court, as to the materiality of that? It occurs to me that that would be immaterial. It may be material. I just don't understand counsel's purpose.

Mr. Roth: All we expect to show by it is that Robert Cummings did talk to Oscar Cummins after he left Mr. Speers; that Oscar Cummins went to Universal and spoke to someone out there about the picture, and thereafter came back and told Robert Cummings about the conference, and then Robert Cummings got on the telephone and told Mr. Speers he wouldn't do this picture and had the conversation which was inquired about.

Mr. Cooper: Very well. I understand the purpose.

Q. By Mr. Roth: Did Oscar Cummins, subsequent to this conversation, advise you that he had seen someone at Universal in respect to this picture? [247]

(Testimony of Robert Cummings)

A. Not exactly that he had seen them, but I know he talked to somebody else, but I can't say whether he went there in person or not.

Mr. Cooper: If your Honor please, I move to strike the answer of the witness as a conclusion, and obviously hearsay.

The Court: Cummings' statement that he knows Oscar Cummins spoke to someone?

Mr. Cooper: That is correct.

The Court: Yes; I think in the present state of the record—Mr. Cummings, between the time you held this lengthy conversation in person with Mr. Speers and the time that you telephoned Mr. Speers to the effect that you would not portray the role of "Hank" in the picture "Fired Wife," did you speak with Mr. Oscar Cummins?

A. Yes, sir.

The Court: And did you learn from him that he had spoken to either Mr. Speers or some agent or representative of the Universal Pictures Company?

A. Yes, sir.

Q. By Mr. Roth: And it was after that that you had your telephone conversation with Mr. Robert Speers to which you have already testified; is that correct?

A. Yes, sir.

Mr. Roth: That is all.

Mr. Cooper: One further question. [248]

(Testimony of Robert Cummings)

Redirect Examination

Q. By Mr. Cooper: Did you ever make a request to the studio for release from your contract, to enter military service?

A. Did I personally?

Q. Yes. They never turned you down on that, did they?

Mr. Roth: Just a moment. Let us have one question at a time.

Mr. Cooper: All right.

Mr. Roth: Would you read the question, Mr. Reporter?

(Question read by the reporter.)

The Court: Let us get back to the prior question.

Mr. Cooper: That is all right. A. No.

Mr. Cooper: That is all.

Mr. Roth: That is all.

The Court: You may step down. May I inquire whether you have some additional witnesses?

Mr. Cooper: No, if your Honor please. With the exception of that one matter that is still pending with respect to Mr. Kelley, the defendant is about to rest.

The Court: As I understand it, counsel contemplate waiting after adjournment this afternoon and conferring with the reporter, and endeavoring to reach some conclusion respecting the matters which remain in abeyance?

Mr. Cooper: That is correct, your Honor. [249]

Mr. Roth: Yes, your Honor. I think we will be able to arrive at some conclusion within a few minutes.

The Court: Is it contemplated that there will be some further testimony by way of rebuttal?

(Testimony of Robert Cummings)

Mr. Roth: Yes, your Honor. I may, by way of rebuttal, put Oscar Cummins on the witness stand to testify to a number of conversations he had with Mr. Muhl and with Mr. Speers at Universal or over the telephone between the dates of April 10th and May 29th. And I may put Robert Cummings on in rebuttal for some direct questions, but it may be also that before tomorrow morning I may decide to rest on the evidence of the defendant, as far as estoppel is concerned.

The Court: Well, then, we will take the adjournment until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until 10 o'clock a. m., Thursday, January 6, 1944.) [250]

— — —

Los Angeles, California, Thursday, January 6, 1944;
10 a. m.

(Parties present as before.)

Mr. Roth: If the court please, after the adjournment last night, Mr. Cooper and I went over the notes of the shorthand reporter, and plaintiff has agreed to stipulate that the transcription of the conversation Mr. Kelley had with Mr. Thau on May 28th might be received in evidence. Counsel for the plaintiff has also waived the demand we made upon Mr. Kelley to bring in the records of transcriptions made by Mr. Kelley or his secretary during the month of May, 1943.

Mr. Cooper: If your Honor please, we accept the stipulation, counsel. I might say that my recollection was correct, that counsel had inquired about the conversation, and, with the court's permission, I should like to read the conversation into the record.

The Court: Yes. Now, you are about to read into the record the transcript made in the defendant's studio of certain conversations had between the witness Kelley and whom?

Mr. Cooper: Benny Thau, of M-G-M, on May 28th.

The Court: It is just one conversation?

Mr. Cooper: Just one conversation, your Honor.

The Court: Very well.

Mr. Cooper: "Thau: Did they talk to you about Bob [251] Cummings—

"Kelley: Yes, the guy is on suspension—he just refused to do a picture over here, and it is one of those things again—he said he would rather do pictures on the outside.

"Thau: Well, we have a great part here.

"Kelley: Well, he is on suspension here—we wouldn't let him go on the outside—if we did that he would never do a picture here. He claims he can't do a picture on account of being in the army.

"Thau: Well, we could use him here—

"Kelley: We can't do that—he is under suspension.

"Thau: Well, when we have such cases here we lift the suspension until the part is finished and then the suspension is resumed when he finishes the role.

"Kelley: Yes, Ben, but then we couldn't get anything here.

"Thau: Well, I don't even know if he likes the picture—if you have nothing for him—

"Kelley: We have and he wouldn't work—

"Thau: I thought that picture was finished.

"Kelley: It is but we got a picture now we could put him into. You know what we are up against. We have to use the Bog Paiges and Alan Curtis'—we are in a Hell of a fix.

"Thau: Well, what is it if he don't work for you. Maybe we could work out your problem for you.

"Kelley: No—everything was fine. He did the Boyer [252] picture and was all set to do the other—everything was fine and he was tickled to death and two days before the picture was to start he called and said he couldn't work—that he was going into the Civil Air Patrol—so that's the situation.

"Thau: Okay."

Do you desire, counsel, that we offer the transcription in evidence?

The Court: At least it will be available for reference purposes.

Mr. Cooper: I will offer it, then, as defendant's exhibit next in order, for the purposes of reference.

I should like to ask the plaintiff one more question.

The Court: Just a moment. Let us mark that as an exhibit of the defendant. It will be Defendant's Exhibit D.

[DEFENDANT'S EXHIBIT NO. "D"]

TELEPHONE CONVERSATION

May 28th (With Benny Thau)

T—Did they talk to you about Bob Cummings—

K—Yes, the guy is on suspension—he just refused to do a picture over here and it is one of those things again—he said he would rather do pictures on the outside

T—Well, we have a great part here

K—Well, he is on suspension here—we wouldn't let him go on the outside—if we did that he would never do a picture here. He claims he can't do a picture on account of being in the army

T—Well, we could use him here—

K—We Can't do that—he is under suspension

T—Well, when we have such cases here we lift the suspension until the part is finished and then the suspension is resumed when he finishes the role

K—Yes, Ben, but then we couldn't get anything here

T—Well, I don't even know if he likes the picture—if you have nothing for him—

K—We have and he wouldn't work

T—I thought that picture was finished—

K—It is but we got a picture now we could put him into. You know what we are up against. We have to use the Bob Paiges and Alan Curtis' We are in a Hell of a fix.

T—Well, what good is it if he don't work for you. Maybe we could work out your problem for you

(Defendant's Exhibit D)

K—No—everything was fine. He did the Boyer picture and was all set to do the other—everything was fine and he was tickled to death and two days before the picture was to start he called and said he couldn't work—that he was going into the Civil Air Patrol—so that's the situation

T—Okay

[Endorsed]: Case No. 3242-H-Civ. Cummings vs. Universal. Defendant's Exhibit No. "D" in Evidence. Date: Jan. 6, 1944. Clerk, U. S. District Court, Sou. Dist. of Calif. L. Wayne Thomas, Deputy Clerk. [247]

Mr. Cooper: I just have one question. [253]

ROBERT CUMMINGS,

a witness heretofore duly sworn on behalf of plaintiff, upon being recalled for further examination, testified as follows:

Further Cross-Examination

Q. By Mr. Cooper: Did you at any time, before or after April 10, 1943, receive permission in writing from the studio to leave Los Angeles?

A. Permission from the studio?

Q. Yes.

Mr. Roth: In writing?

Mr. Cooper: That is right.

A. I can't say that I did.

Mr. Cooper: That is all.

Mr. Roth: No questions.

Mr. Cooper: The defendant rests, your Honor. [254]

REBUTTAL.

Mr. Roth: I will call Mrs. Cummins.

ADELINE CUMMINS,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Adeline Cummins.

Direct Examination

Q. By Mr. Cooper: Mrs. Cummins, you are the wife of Oscar Cummins? A. Yes, sir.

Q. And where did you reside on or about April 10, 1943? A. 810 Warner Avenue.

Q. At that time did you have a maid in your employ? A. Yes.

Q. On or about April 10, 1943, were you called by Western Union, and was a message read to you over the telephone? A. No.

Q. I will show you a telegram, which has been introduced in evidence here as Defendant's Exhibit B, and ask you to read it. A. Aloud?

Q. No—to yourself. Was any message like that read [255] to you on April 10, 1943?

A. No, it was not.

Q. Was any message like that read to you on April 11, 1943? A. No.

Q. Was any message like that read to you on April 12, 1943? A. No.

Q. Do you know whether or not you were in town on April 10, 1943?

A. Since the date has arisen, I am in doubt whether I was in town. I think I was in Palm Springs at that time.

(Testimony of Adeline Cummins)

Q. When you are out of town is the maid at your home? A. Sometimes.

Q. Whether you were in town or out of town, did your maid ever tell you that a message like that had been delivered at the house?

A. No, she never told me.

Mr. Cooper: That is all.

Mr. Roth: No questions. I will call Oscar Cummins. [256]

OSCAR CUMMINS,

a witness heretofore duly sworn on behalf of plaintiff, upon being recalled as a witness in rebuttal, testified as follows:

Direct Examination

Q. By Mr. Roth: I think you have been sworn, haven't you? A. Yes, sir.

Q. Mr. Cummins, did you ever make a statement to anyone connected with PRC between the dates of April 10th and June 3rd, 1943, that Robert Cummings was not available for a picture, because he was in the air shuttle service, and if anyone wanted to make a picture with Robert Cummings they would have to call the—

A. No.

Mr. Cooper: To which we object on the ground that it is immaterial.

The Court: Let the answer go out.

Mr. Cooper: It is not material. It isn't material what he told the PRC. It is what he said to the witness Muhl. It is immaterial what he said to PRC. Mr. Muhl testified as follows: Muhl testified that he had a con-

(Testimony of Oscar Cummins)

versation with this witness on May 28th, in which this witness said to him, Muhl, as follows: That PRC, a producing organization that he, Cummins, had not heard of before, had called him and asked him about Cummings' availability, and that he, Cummins, advised them that Cummings was engaged [257] in work in connection with the air shuttle service, and if anyone wanted him they would have to see General Arnold of the Army Air Corps to get him.

Mr. Roth: If your Honor please, even from the statement which was read, which was a crystallization of a conversation Muhl had with Oscar Cummins, it appears that the statement was made to PRC, but if there is any ambiguity it is settled by Muhl's own affidavit, which is on file, in which he says the following, on page 2 of his affidavit:

"Prior to the receipt of the notice sent by Robert Cummings referred to above, I had a telephone conversation with Oscar Cummins, the attorney and personal representative of the plaintiff, on March 28, 1943,"—it is, in the affidavit, which he corrected—"at or about 10:00 a. m. of said day. I told Oscar Cummins that I had heard a rumor that Metro-Goldwyn-Mayer was interested in Robert Cummings, and I asked him if he knew anything about it. Oscar Cummins stated that he hadn't heard anything about it, but that P-R-C, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him."

(Testimony of Oscar Cummins)

First I want to find out whether he said that to anyone at PRC, and then whether he repeated that to Mr. Muhl. [258]

Mr. Cooper: My position is that whether he did or did not mention that to PRC or anyone else is immaterial. The only materiality here is whether or not he did make the statement to Muhl.

The Court: First of all, does the defense contend that this witness made any such statement to PRC? If you make no such contention, I will sustain the objection.

Mr. Cooper: We don't know, if your Honor please.

The Court: Will you make any argument to that effect?

Mr. Cooper: No, your Honor.

Mr. Roth: I will withdraw the question.

Mr. Cooper: We cannot do so, on the state of the record.

The Court: That clears up the ambiguity.

Q. By Mr. Roth: Did you ever say to Mr. Muhl, substantially or in effect, on May 28, 1943, or at any other time, any of the following: "Oscar Cummins stated that he hadn't heard anything about it, but that P-R-C, a producing organization, had called him and asked about Robert Cummings' availability, and he told them that Cummings was engaged in work in connection with the establishment of an air shuttle service and that if anybody wanted him they would have to see General Arnold of the Army Air Corps to get him"?

Did you ever make that statement to Mr. Muhl, substantially or in effect? A. No.

Q. Did you ever make that statement to anyone, [259] substantially or in effect?

(Testimony of Oscar Cummins)

Mr. Cooper: That is objected to as immaterial, whether he made it to anybody else or not.

The Court: I am inclined to think so.

Mr. Roth: Suppose he made it to Kelley.

Mr. Cooper: If he made it to Kelley, you should have put Mr. Kelley on the stand to testify to it.

Q. By Mr. Roth: All right. Did you have a conversation with Mr. Muhl and Mr. Speers shortly before April 12, 1943? A. Yes.

Q. You did have? A. Yes.

Q. Where did the conversation take place?

A. In Mr. Muhl's office.

Q. Mr. Speers was present?

A. Mr. Speers was present.

Q. Anyone else there?

A. No; just the three of us.

Q. State what was said.

A. Bob Cummings had called me on the phone and told me the way they had changed the picture, and asked me if I wouldn't go over and try to intercede and get the original cast, and have a director of comparable standing, which merits his direction. And I called Bob Speers on the phone and made the appointment with Bob Speers and Eddie Muhl, and went over and saw them in Eddie Muhl's office, and told [260] them the fact that Bob couldn't, under any circumstances, make a picture with a man like Charlie Lamont, and they both at that time told me that Charlie Lamont was not a good director, that they knew it, that the studio was trying to build him up, and I asked Eddie Muhl directly, "If you will please get me a good director I will intercede with Bob and have

(Testimony of Oscar Cummins)

him make the picture," and Eddie Muhl said, "It is Charlie Lamont, and that is it," and I left it there.

Q. Was there anything said in that conversation by you or by either you or Mr. Muhl or Mr. Speers about the Civilian Air Patrol, or the fact that Robert Cummings was going into the armed service?

A. No, there was no such thing.

Q. You are familiar with Defendant's Exhibit A, the telegram of April 10th, which was introduced in evidence here? It is April that I am referring to. Did you receive a copy of that telegram on April 10th?

A. No.

Q. Were the contents of that telegram transmitted to you in any way on April 10th? A. No.

Q. Did you receive it on April 11th? A. No.

Q. Were the contents of the wire transmitted to you in any way on April 11th? A. No. [261]

Q. Did you receive it on April 12th? A. No.

Q. Were the contents of that telegram transmitted to you in any way on April 12th? A. No.

Q. When was the first time you heard about it?

A. The first time I heard about that telegram was when you called me recently and asked me if I had ever heard of it.

Q. Did I ask you to search your files for a copy of it?

A. Yes.

Q. Did you find any? A. No.

Q. Did you, in any conversation you had with Mr. Muhl, or that you may have had with Mr. Speers, or that you may have had with Mr. Ward or Mr. Speers, between April 5th and June 3, 1943, ever say, in substance or effect, anything to the effect that Robert Cummings

(Testimony of Oscar Cummins)

was unavailable because he had joined the Civil Air Patrol for the duration of the war? A. No.

Q. Or that he had joined the air forces of the United States for the duration of the war? A. No.

Q. You heard read into evidence yesterday a stipulation as to telephone conversations between yourself and Mr. Muhl [262] between the dates of April 10th and June 3, 1943? A. Yes, I did.

Q. In any of those telephone conversations was anything said by you or Mr. Muhl to the effect that Robert Cummings was unavailable by reason of the fact that he had joined the air forces of the United States or that he had joined the Civil Air Patrol for the duration of the war? A. Absolutely not.

Mr. Roth: Cross examine.

Cross-Examination

Q. By Mr. Cooper: You did know, did you not, that Bob Cummings had been instructed to report at 10 o'clock on April 12th at the offices of Mr. Dan Kelley, didn't you?

A. I think either Bob Speers or Eddie Muhl told me that.

Q. When did they tell you that?

A. I think that was in the conversation Muhl related yesterday, on April 13th. I am not certain of the date.

Q. No. I mean before the 13th, didn't you know that Robert Cummings had been instructed to report at Dan Kelley's office? A. No.

Q. On April 12th, at the hour of 10 o'clock a. m.?

A. No.

(Testimony of Oscar Cummins)

Q. Do you know where Bob Cummings was on the 10th of April, 1943? A. I don't know. [263]

Q. As a matter of fact, you know that he was out of the city, don't you?

A. On the contrary, I think he was in town.

Q. What makes you think that? Do you have some recollection of his being in town on April 10th?

A. The only recollection I have is that during the controversy in reference to the picture called "Fired Wife," I was in touch with Bob constantly, and I feel certain that he was around town.

Q. That is just a feeling you have?

A. It is my best recollection.

Q. As a matter of fact, the controversy and the conversations about whether he would or would not perform the role of "Hank" in "Fired Wife" occurred about the 3rd or the 5th of April; isn't that correct?

A. I can't state the time, because I don't have any memoranda, but I am confident that Bob Speers and myself discussed that up until the last moment.

Q. Did you have this conversation with Ed Muhl on the 13th of April?

Mr. Roth: Pardon me. You promised me copies of those.

Mr. Cooper: I don't recall that I promised you. If I did it slipped my mind.

Mr. Roth: I would just like to follow you.

Mr. Cooper: Certainly. That is perfectly all right.

Q. By Mr. Cooper: At 12:40 p. m. on April 13, 1943, [264] although the time is immaterial, did you tell him— Well, let me read the whole thing and ask you if this happened, in substance or effect: Ed Muhl admitted

(Testimony of Oscar Cummins)

you and told you that, following up Robert Cummings' talk to Bob Speers over the telephone, that he was in the CAP for the duration, and that, in effect, he would not report for his role in the photoplay "Fired Wife," that we, meaning Universal, had wired Cummings to report yesterday morning to Dan Kelley, and that, of course, he failed to do so, and that we, to establish a clear position, intended to suspend him from the payroll as of that date, and you said that that was entirely proper. You further stated that you were sick at the situation which had arisen, and that you would talk to Bob about it, and you were trying to get him to come in and have a further discussion with Bob Speers and himself. And at this point Ed Muhl told you that they were, of course, going forward with their plans to recast the role, and you said that you understood that they would have to do this, but you didn't think this situation was fair to Bob or to the studio or to Bob's country, and you would like to straighten it out. Did you have that conversation, in substance or effect?

A. There was a conversation, but there is so much in there that never occurred that it is astonishing.

Mr. Cooper: I will give him this.

The Court: May I suggest, in view of the witness' [265] answer, that you let him pick out those portions of the alleged conversation which the witness, on the one hand, concedes took place, either in substance or effect, and the portions which he is prepared to state were not part of any such conversation.

The Witness: I am presuming that this conversation took place on the 13th of April, at which time Eddie Muhl called me on the phone. In the first place, there was never

(Testimony of Oscar Cummins)

any discussion about the CAP, and never any discussion about Bob going in for the duration. He told me that they were going to suspend Bob. I offered no statement; I wasn't advising them. We didn't discuss the suspension any further than that. He told me they were going to suspend Bob. Here, if your Honor please, this is underscored.

Mr. Cooper: That is my underscoring.

A. (Continuing) There was no statement to the effect at that time that I was still trying to get Bob to come in, because they knew, after I left the studio—

Mr. Roth: Don't guess at what they knew.

The Court: Let that part go out.

A. (Continuing) I told him that the situation was very unfair to Bob, because of the promises that were made and the promises that were broken.

Q. By Mr. Cooper: Was anything mentioned to you on April 13th about a wire having been sent?

A. No, sir. [266]

Q. At any time on April 10th, or up to and including, we will say, April 15th, was any mention ever made in any conversation about a wire that had been sent to Bob Cummings?

A. No, sir.

Mr. Cooper: If your Honor please, it is my recollection that the witness testified, when I first started to cross-examine him, that the only thing mentioned about a wire was in a conversation with Ed Muhl. Could I have the reporter read that back to me?

The Court: I think you will find that there is no reference to a wire, but I will let the reporter go back and read that portion of the testimony.

(Testimony of Oscar Cummins)

Mr. Cooper: I won't waste the time of the court. The record will speak for itself.

Q. Now, did you talk to Ed Muhl on or about May 28th on any subject? A. No.

Q. What makes you so positive about it?

A. Because I know I didn't talk to him on May 28th.

Q. Did you talk to him at all on the telephone at any time between April 13th and May 28th? A. Yes.

Q. Approximately how many times?

A. I don't know how many times, but I know he called me in the middle of May and asked me if I knew that Robert Cummings— [267]

Q. I am not asking you for the conversation. I am asking you when you had the conversation.

A. I think that was in the middle of May.

Q. About the middle of May, about May 15th?

A. I don't know.

Q. I do not want to hold you down to that date, Mr. Cummins, but you said about the middle of May, and so I say, on or about May 15th. Is that fair enough? The middle of May. All right. Sometime the middle of May did you have a conversation with him, to the best of your recollection, on the telephone, between the middle of May and the last part of May? A. Yes.

Q. All right. Will you fix, then, the approximate date, to the best of your present recollection, when the next conversation took place between the middle of May and the last of May?

A. It was the latter part of May, around the 25th or 26th.

Q. Do you have some way of fixing the date of May 25th or May 26th in your mind? A. Yes.

(Testimony of Oscar Cummins)

Q. How do you fix that date?

A. I had luncheon with Mr. Muhl and one of the other executives of the studio, an Army captain, at Universal Studio. [268]

Q. I take it that you know, or at least you have testified that on or about the 26th of May you made a request for the check of Bob Cummings?

A. That is correct.

Q. With reference to the date of that request, when did you have luncheon with this Army captain and Ed Muhl?

A. On the same day.

Q. Did you make any reference on that day to the check, that you were requesting a check for Robert Cummings?

A. No. I left the luncheon and went back to Mr. Muhl's office, and left his office on or about 2:30, and went over to the paymaster and asked for it, and it wasn't there, and I went into Mr. Steinberg's office and asked him if Bob's check was ready, and he looked in his files, and he came back and said, "No; Bob is still under suspension."

Q. You knew, then, on the occasion when you were having lunch with Ed Muhl that you were going to make a request for the check, didn't you?

A. I knew I was going to ask for Bob's pay, which he was legally entitled to.

Q. You knew he was under suspension, didn't you, at least from the notices that had been sent by the studio?

A. I knew he was under suspension for five weeks and two days, from the notice.

(Testimony of Oscar Cummins)

Q. You received the notice of May 18th, did you not, putting him on suspension? [269]

A. I don't remember the date I received the notice.

Q. I will read you the one of May 18th.

Mr. Roth: We will stipulate that it was sent.

Mr. Cooper: I want to read it to him.

Mr. Roth: I will stipulate to the date. I am not suggesting that you do not read it to him.

Mr. Cooper: Thank you very much, counsel.

Q. By Mr. Cooper: Did you not receive this notice before May 26th, the notice dated May 18th, as follows:

"Mr. Robert Cummings
c/o Mr. Oscar Cummins
9441 Wilshire Blvd.,
Beverly Hills, California.

Dear Mr. Cummings:

"Your employment under your contract of employment with us dated November 21, 1938, as heretofore amended, has been suspended by reason of your failure, refusal and/or neglect to perform your obligations under said contract, as amended, for a period of five weeks and two days commencing April 12, 1943. This is to notify you that we have elected to and do hereby exercise the right granted under the terms of said contract, as amended, to extend the term of your employment thereunder for a period equivalent to the suspension by reason of said failure, refusal and/or neglect. Your employment under said contract, as amended, will be further suspended during the continuance of your present failure, [270] refusal and/or neglect to perform your obligations thereunder."

You received that? A. Yes.

Q. You read it? A. Yes.

(Testimony of Oscar Cummins)

Q. You knew then that Universal was of the belief, at least, that Robert Cummings was under suspension, didn't you?

Mr. Roth: That is objected to as calling for a point of law, and as to what Universal knew.

The Court: I think the question in its present form is open to that criticism, and the objection is sustained.

Mr. Cooper: Very well.

Q. By Mr. Cooper: What did that notice mean to you? A. Nothing.

Q. You are a lawyer? A. Yes.

Q. You have been admitted to practice for how long?

A. 24 years.

Q. Did you expect to get the check when you went there? A. Absolutely.

Q. You went there for that purpose? A. Yes.

Q. For no other reason?

A. For no other reason. [271]

Q. Didn't you go there for the purpose of merely establishing the fact that there was no check there?

A. Absolutely not.

Q. Why didn't you go back to Ed Muhl and ask him about it?

A. There was no need for me to go back and discuss a check that was supposed to be there.

Q. You had done that before and you got the matter straightened out, hadn't you?

A. Never on a question of a check that was due to Bob for salary.

Q. You had some other people call out there, did you not? A. Certainly.

(Testimony of Oscar Cummins)

Q. And you had one of those conversations recorded, didn't you?

A. What do you mean "recorded"?

Q. You had somebody listen on an extension line and take it down?

Mr. Roth: That is assuming a fact not in evidence. He listened in and somebody else called.

Q. By Mr. Cooper: You listened in when somebody else called, didn't you? A. Yes, sir.

Q. Was that for the purpose of getting the check, or for the purpose of proving that the check wasn't ready?
[272]

Mr. Roth: I object to what the motive was, as immaterial.

Q. By Mr. Cooper: Why did you do that?

Mr. Roth: The same objection.

Mr. Cooper: I think his motive is very important in this case, it being an equitable matter.

The Court: It is not clear to me. I will let the witness answer.

A. I couldn't believe that, after all these professions and statements of great love and affection and concern about Bob's welfare, that the studio would deliberately go and withhold his pay that was due him.

Q. By Mr. Cooper: You knew, did you not, that Universal wanted the use of his services?

Mr. Roth: Just a moment. That is objected to as assuming a great deal that is not in evidence.

Mr. Cooper: We have a right to assume things that are not in evidence on cross examination.

(Testimony of Oscar Cummins)

The Court: I think the question asks the witness to testify to what was in the minds of the studio officials, and I think the objection is well taken.

Mr. Cooper: I am asking what his state of mind was.

The Court: What was the question?

(Question read by the reporter.)

Mr. Cooper: I will withdraw it.

Q. By Mr. Cooper: You believed, did you not,—I am asking for your belief—that the studio was anxious to [273] use his services?

Mr. Roth: Objected to as immaterial, whatever his belief was, and all the evidence is to the contrary, and the statement made in counsel's own brief was to the effect that they didn't think they could get his services.

Mr. Cooper: That is true, but they wanted them, nevertheless.

The Court: Did you have any fixed belief on the subject?

A. No, I didn't have any fixed belief on that subject.

Q. By Mr. Cooper: Now, on May 26th, when you made the request for the check, you were told, were you not, that there was no check for Bob Cummings, that he was on suspension? A. That is correct.

Q. Why did you have these other people call up afterwards?

A. I just told you that I couldn't believe that a studio that had professed such a great interest in a man and made all the promises they made would keep him under suspension, when they knew that legally they had to put him back on salary.

Q. Why didn't you call Ed Muhl?

(Testimony of Oscar Cummins)

Mr. Roth: Objected to as immaterial. There was no duty to call Ed Muhl, and the state of mind of the witness is immaterial.

The Court: It is not clear to me why either the [274] plaintiff or anyone representing him was called upon to take up this matter further with Mr. Muhl or any other representative of the studio. I may have missed something in the evidence, but my present appraisal of it doesn't point out wherein there was any duty or obligation to call on any of the officials.

Mr. Cooper: If your Honor please, this is an equitable action. They are not asking for relief at law. They are asking to have this contract terminated. They must come into a court of equity with clean hands, and all of their actions must have been in good faith. It certainly goes to the good faith of this witness, whether or not at all times in the past all matters of this sort were taken up with Ed Muhl and the contract department, and he knew it. There is testimony here to that effect.

The Court: Very well. I still don't grasp what there is about equitable principles with respect to a contract and the termination thereof on the part of one of the contracting parties, where, if a breach has been committed by one side, the other is called upon to do anything. That may have been a method of, shall we say, repairing the breach.

Mr. Cooper: That is correct.

The Court: But I am still at a loss to figure out wherein, either upon principles of good faith or any other legal doctrine, the party injured as the result of an [275]

(Testimony of Oscar Cummins)

alleged breach by another party, is called upon to do anything further about it.

Mr. Cooper: Well, if your Honor please, the point that I make is this: Had he gone to Ed Muhl or any of the persons who had the authority to do it, he knew, and he knows it in his heart right now, that they would have given him the check immediately, if he had told them that he was ready, able and willing to work.

The Court: Isn't that an argument to be made, perhaps, when we come to appraise the evidence? Now, it seems to me that at least this much has been made clear by one or more of the defendant's employees; the studio took a position to the effect that the plaintiff was suspended, according to the defendant's theory and according to the testimony of some of its witnesses, first, that the plaintiff was suspended for the time required to complete the picture "Fired Wife"; and, secondly, he was suspended for the duration of the war.

Mr. Cooper: May I interrupt, your Honor, on that point?

The Court: Well, let me state, shall we say, my appraisal of the evidence as I presently see it, because it may help us in determining the matter.

Mr. Cooper: Yes.

The Court: My recollection is not clear as to which of these employees actually issued the order for the suspension, but the suspension was for the duration of the war, according [276] to the testimony, at least, as I construe it. Now, I am at a loss to know upon what legal principle the party adversely affected thereby was called upon to try—

(Testimony of Oscar Cummins)

and perhaps failed, but at any rate it is purely speculative—to try to convince his employer to change his position.

Mr. Cooper: Well, for this reason, if your Honor please—the part I wanted to interrupt your Honor about was this, but sometimes when I don't interrupt on a particular point I forget it later—Your Honor says the studio suspended him, first, during the period that would be necessary for someone else to portray the role of "Hank," and, secondly, for the duration. I don't know whether it makes any difference in your Honor's mind which came first, but the notice said, first, that he was suspended for his failure to report, and, secondly, he was suspended for the period it took to portray the role. I don't know whether it makes any difference in your Honor's mind.

The Court: No, it does not.

Mr. Cooper: But I thought maybe your Honor placed some significance on it.

The Court: Perhaps we can say that in speaking off-hand we are not altogether accurate in our choice of phraseology. What I had endeavored to say was that one or more of the studio officials, according to their testimony suspended the plaintiff, if not on two different dates, at least have undertaken to tell us for two periods. The first of the two [277] periods—I am not speaking now as to chronology—but one of the periods related to or embraced the time required to produce the picture "Fired Wife," and the other period embraced the period that would be represented by the duration of the war.

Mr. Cooper: That is correct, if your Honor please. However, it appears, I think fairly, from the evidence that

(Testimony of Oscar Cummins)

during the period in question the plaintiff was in fact available. His military status, or whatever his status was, from his testimony, appeared to be that he was, nevertheless, ready, able and willing to work. Now, again, of course, I do not know, and maybe your Honor does not now know, what view your Honor is going to take of the evidence.

The Court: Let me reassure you by saying that I have several questions that I am going to suggest should be clarified by some additional evidence.

Mr. Cooper: I understand.

The Court: It may comfort you to know that I haven't reached a decision.

Mr. Cooper: I understand, your Honor. But my point is this: It is the defendant's position that they were led to believe, whether it was true or not, that he was going to be unavailable to them for the duration of the war, and it is our contention that that belief was justified, first, by statements made by the plaintiff, Robert Cummings, and, second, under our view of the evidence, by this witness. [278] Now, I think we have a right to assume, notwithstanding his denial, if your Honor please, that he told them that, and now he is taking the position in his testimony that he was in fact available, and it seems to me we have the right to inquire, we have the right to show that, in fairness and in good faith, and in decency and in law, actually it was his duty to communicate that situation to the persons that he had always discussed it with before, who had the right and the authority to put him back on the payroll.

(Testimony of Oscar Cummins)

The Court: Now, will you, at least, reframe the question as you think it should be?

Mr. Cooper: I have forgotten now what the question was.

Q. By Mr. Cooper: You have stated that you came there expecting the check; is that correct? A. Yes.

Q. You expected that there would be a check available for you, notwithstanding the notice of May 18th?

A. Absolutely.

Q. And when you had these other people call up, you expected still that there would be a check, did you?

A. I did, from the professions of great interest that they had shown in Bob, how they were going to try to make him a big star, that the check would be there.

Q. On May 26th you were told personally that he was on suspension? A. Yes. [279]

Q. On May 18th, you received the notice of May 18th?

A. Yes.

Q. So when you instructed these people to call upon the 27th, and when you listened in, you fully expected that there would be a check; is that correct?

A. Yes, sir.

Q. Is that your testimony? A. Absolutely.

Q. Didn't you have in your mind at that time—weren't you trying to figure out—weren't you trying to abrogate that contract? A. Absolutely not.

Mr. Roth: That is objected to as immaterial.

A. As a matter of fact, I did everything in the world to try to keep peace at the studio.

(Testimony of Oscar Cummins)

The Court: Let me interrupt to ask the witness: You used the expression "peace at the studio." Peace between whom?

A. If your Honor please, Bob was being constantly referred to as a dirty son-of-a-bitch by Dan Kelley and Bob Speers.

The Court: I didn't ask for the details.

Mr. Cooper: I move to strike the answer.

The Court: Let the answer go out. I merely asked "peace between whom?"

A. There had been all kinds of comment as to what they [280] were going to do for Bob.

The Court: Let that answer go out. I am not asking for the background. I am merely asking you to identify the persons between whom you were seeking to maintain peace.

A. I was trying to keep a good relation and understanding between Mr. Kelley and Bob. I even consulted—

The Court: Well, I don't want any more information than that, because I think you have answered the question.

Q. By Mr. Cooper: Isn't it a fact, Mr. Cummins, that on May 28th you had the following conversation with Edward Muhl?

Mr. Roth: Objected to as having been asked and answered.

Mr. Cooper: If your Honor please, I asked him if he had a conversation on May 28th, and the objection that it has been already asked and answered is not a proper objection on cross examination.

(Testimony of Oscar Cummins)

Mr. Roth: Furthermore, it is not proper cross examination. I asked the witness several direct questions which were designed to rebut evidence already put in. Now, counsel stood up and read that transcript of the conversation of May 28th, the same transcript that he has in his hand now, and is going to read it again.

Mr. Cooper: Maybe you are right. I am not going to waste time on that if it has been answered.

Q. By Mr. Cooper: When was the last phone conversation you say you had with Ed Muhl before, we will say, the 1st of June? [281]

A. I think that was the day before I had luncheon with him and the captain, the one in the offices at the studio, the 25th—it was either the 24th or the 25th, because he called me for a luncheon engagement. That would be May, not June.

Q. Do you recall the conversation of June 3rd?

Mr. Roth: Just a moment.

Mr. Cooper: I will withdraw that, then. I was trying to save time.

Q. By Mr. Cooper: Do you have in mind the conversation that Edward Muhl and Emmett P. Ward had with you on June 3, 1943, at their office?

A. There was a conversation in Ed Muhl's office.

Q. In view of the previous objection—did you hear Ed Muhl testify with respect to that conversation of June 3rd?

A. Yes.

Q. Was his testimony with respect to the conversation of June 3rd in his office, at which Emmett Ward was present, substantially correct?

A. Partially correct.

(Testimony of Oscar Cummins)

Q. Can you point out to us wherein anything was incorrect in that answer?

A. If you will give me a copy of the memorandum—

Q. I will be very happy to do so. (Handing same to the witness.) [282]

A. This is absolutely incorrect, where he says that I stated, when I talked to him over the telephone last week, that I had known nothing about the position that was being taken by Cummings. There was no such discussion, and no such discussion took place at all.

Q. What else in there is incorrect?

A. There was no mention of a former Justice of the Supreme Court.

Q. Was there a mention of a former Judge of the Superior Court, then? A. No.

Mr. Cooper: May it be stipulated that the present counsel, Lester Roth, was a former Judge of the Superior Court?

Mr. Roth: Yes.

A. He says here that I said that we had two girls in the office to take down the conversations. That is not true.

Q. You told him you had one girl take it down?

A. Yes, I told him that. This notice part was stricken out?

Q. Yes, that was stricken out.

A. And there was no mention of any such thing as Mr. Cummings' plan—there was no such discussion.

Q. There was no such discussion about that?

A. No.

Q. You have reference there to that portion?

A. Where he claims there was a plan by Mr. Cummings. [283]

(Testimony of Oscar Cummins)

Q. Meaning you?

A. Meaning Bob. And there was no such discussion as to a deliberate effort to "entrap us"; no such talk took place at all. Now, the last paragraph, where he says there was a wild line, that didn't take place at that meeting at all. That took place in the telephone conversation when Eddie Muhl—I think it was at the beginning of the picture "Fired Wife"—called me and said there was a line in the picture that Bob had just completed, called "Flesh and Fantasy," that there was a wild line in there that they wanted Bob to appear to make, and I said, "If you will advise me when you want him I am certain he will be there." And there were other things that took place which are not in this memorandum.

Q. Before we go into that: Aside from those things that you have pointed out, the balance of the conversation was substantially correct? A. Substantially.

Q. Except that there was something more said, obviously? A. Yes.

Q. And those things were, first, that you didn't state to him, when he talked to you over the telephone last week, that you actually had known nothing about the position being taken by Bob Cummings?

A. That is right. We never even discussed that.

Q. And the second thing is that you mentioned nothing about having taken the matter up with a former Supreme Court [284] Justice or Superior Court Judge? That wasn't discussed?

A. No. Then there was something else in there.

Q. I am going to go ahead. And, third, there was nothing about Mr. Cummings' plan or an effort to entrap the studio?

A. No such discussion at all.

(Testimony of Oscar Cummins)

Q. And, fourth, there was no conversation about a wild line? A. No.

Q. Aside from that, the balance of it is substantially correct? A. Yes.

Q. With such additions as you might care to give?

A. Yes.

Q. You may give them.

A. I called Eddie Muhl on the phone—

Q. Just a moment.

A. —and told him that I would like to see him.

Q. May I interrupt just a moment? While you are on that telephone call, let me show you a transcript of that telephone call and ask you to read that, and ask you if that is incorrect in any particular.

Mr. Roth: What telephone call is that?

Mr. Cooper: June 3rd. You have seen it, counsel.

Mr. Roth: I will look at it, if I may, your Honor. Yes; I remember. I read that. [285]

A. I think this is substantially correct. I don't have any memo of this.

Q. I mean, there is nothing in there that sounds out of line? A. I don't think so.

The Court: Does that purport to be a memorandum of a telephone conversation held on June 3, 1943?

Mr. Cooper: At 12:32 p. m.

The Court: Between this witness and Mr. Muhl?

Mr. Cooper: That is correct, on the telephone.

Q. By Mr. Cooper: Now, you may proceed.

A. I came over to Ed Muhl's office, and I went in to see Eddie first, and subsequently Bud Ward came in, and I told Eddie that I was always trying to create a good relation between the studio and the stars, that I didn't like these things, and he said, "Yes, Oscar, you have been

(Testimony of Oscar Cummins)

wonderful," and I said, "Isn't there some way we can work out an understanding whereby Bob can come back without the necessity of going through a lawsuit?" And he said, "What have you got in your mind?" And I said, "Well, I would like to see some kind of a picture deal worked out so that everybody will be happy." And he said that as far as he was concerned, representing the studio, that they had already taken a legal position and they were going to stand by it, he didn't care whether there was a lawsuit or not.

Q. Or substantially that? [286]

A. In substance like that, yes.

Q. Anything else?

A. There was a lot of talk, personal conversation. That was the chief thing about the whole conversation.

Q. May I ask you, how many affidavits did you file in this case? This is preliminary, if your Honor please, to another question. I have two in my file.

Mr. Roth: There may have been three altogether. There were two supplementary affidavits, because after your affidavit came in I had to file replies.

A. I think there were three.

Q. By Mr. Cooper: Was there an affidavit by you—

Mr. Roth: Here is one, here is two, and here is a supplemental affidavit.

Mr. Cooper: No further cross examination.

Mr. Roth: No questions. That is all.

The Court: It is not clear to me—perhaps counsel recall and can answer this—Did any witness, or, rather, does the testimony disclose the identity of the particular official or employee of defendant who issued what I think has been referred to as the order of suspension?

Mr. Cooper: It is my recollection, first, that Mr. Dan Kelley stated that when Bob Speers told him about this conversation, he told him to put him on suspension and send him a telegram, and that he mentioned the contract department, or left the wording of it to them. Then there is testimony [287] of Emmett Ward that he prepared the letter of May 9th, and took that matter up with the head of the contract department, Mr. Ed Muhl, who ultimately testified that he was the one who sent out the notification. He testified that he put him on suspension. That is my recollection of the testimony. Is that substantially correct?

Mr. Roth: I think that is a fair statement, your Honor.

Mr. Cooper: That is my belief as to the state of the record.

The Court: I want to make sure that I know to whom you are referring when you speak of "he." You mean Ed Muhl is the one who placed the plaintiff on suspension?

Mr. Cooper: That is my recollection, your Honor. I think, if your Honor please, there is testimony by Emmett Ward that he first placed him on suspension. You recall he testified with respect to Oscar Cummins coming in and he told him that he had placed him on suspension as of April 9th.

Mr. Roth: I think Emmett Ward testified that after he left Dan Kelley's office he went back to his department, and then called up the paymaster's department and ordered

that Mr. Cummings be put on suspension. I think that is the direct testimony from Ward. I think Muhl testified that he went over all the notices and O.K.'d all the notices before they were sent.

Mr. Cooper: That is right.

Mr. Roth: And I think Kelley testified that when Speers [288] came in and told him about the conversation the second time, that he called in Ward and told him to place Cummings on suspension, and that then Ward followed through. I think that is substantially the testimony.

The Court: During the trial I gathered the impression that defense counsel has shown the plaintiff's counsel portions of defendant's files relative to various matters pertaining to the plaintiff and his employment by the defendant. I am prompted to ask whether such disclosures included anything in the nature of a written record of this suspension of the plaintiff.

Mr. Cooper: A written record of the suspension?

The Court: Yes.

Mr. Cooper: The only written record of the suspension that I know of would be the notices that have been mailed.

The Court: I am referring to something in the files of the defendant over and beyond those notices.

Mr. Cooper: I have the file here, if your Honor please, which I will have no hesitancy in showing to counsel. I read everything in it. I do not recall anything other than the notices.

Mr. Roth: That is incorrect. Counsel has not shown me the files, and neither have I asked counsel to see his files. At one stage of the proceeding, I think in connection with the examination of Robert Speers, there was a question as to whether or not Mr. Speers had certain

information from the [289] data or memoranda in the files of Universal, and at first I thought he said yes, he had referred to some data or memoranda, and he was indicating files of Universal, but Mr. Cooper indicated that he did have files of Universal, and showed me a letter, which apparently had refreshed the recollection of Mr. Speers. That was the letter of April 9th, which is now in evidence as an exhibit. Subsequently, the court will recall, Mr. Speers testified that he didn't use that letter to refresh his recollection, but that what he had used was a memorandum which he had dictated on July 2, 1943. That is the extent to which I have seen the files of the defendant or defense counsel, other than the transcripts of these conversations, which have been proffered to the various witnesses, and they were shown to me before they were shown to the witnesses. That is all the files I have seen. That is what I thought the court had in mind.

The Court: That is what I had in mind. I had observed that something was being shown to you, apparently, from the defendant's files, but I didn't know how much.

Mr. Cooper: I was only showing him those things that he has mentioned, which I felt he had a right to see. But I will say this, that I do not know just exactly what your Honor has in mind with respect to an order of suspension, or a written notice of suspension.

The Court: I didn't know whether or not, in addition to these notices, the defendant had made some sort of a record. [290] It has been brought out that some of the defendant's officials or executives from time to time made records of one kind or another, and it occurred to me to inquire whether or not, over and beyond these notices and telegrams, one of these executives had also made up

some type of record as to what has been referred to as the suspension order.

Mr. Cooper: No. If your Honor please, I am fairly familiar with these files; I have, in fact, worn them out; and it would have been contained in this file which I have here, file No. 3, and the only thing in the nature of notices, that contains the notice of suspension, are the affidavits of mailing and the returns, and things of that sort. Those are the suspension. It is my impression that when they put a man on suspension they merely call the payroll department and put him on suspension for some time, or they may send a notice. Would your Honor like some testimony on that?

The Court: No. There has been testimony as to what was done here, and I was interested to know whether, among the records that were kept by one or more of the executives of the defendant, there was something additional, of the character that I have outlined, and apparently you are under the impression that there was nothing further.

Mr. Cooper: That is correct, your Honor. Maybe I am wrong. He (Mr. Erlich) says the payroll department would have a record of the suspension, in the payroll department.

The Court: Would that be anything more than just simply [291] a notice to the effect that the plaintiff was suspended?

Mr. Erlich: That is all, your Honor.

Mr. Cooper: And the period of time would be on there too.

The Court: It would?

Mr. Cooper: Yes, your Honor.

The Court: That, I think, has been made sufficiently clear. Then there is something further. The testimony has referred to the fact that some time in 1942 the plaintiff joined the Civil Air Patrol and continued as a member of that service until some time in the year 1943, and that during the same period he portrayed various roles in various motion pictures. I think it is pertinent to inquire, firstly, the period included during the making of these various pictures, in 1942 and 1943, and also the period when the plaintiff was absent from Los Angeles in connection with the performance of his duty or service pertaining to the Civil Air Patrol, between the time that he joined the Civil Air Patrol and May 26, 1943. Am I correct that this morning, when the plaintiff was recalled to the stand, he was asked whether, during some particular period, he had received written permission from the defendant to leave Los Angeles?

Mr. Cooper: My recollection of that is that he was asked if at any time he ever received permission from Universal to leave Los Angeles, written permission. Is that your recollection?

Mr. Roth: I think substantially so. [292]

The Court: Mr. Reporter, will you turn back to your notes relative to the testimony of the plaintiff when he was recalled this morning?

Mr. Cooper: May I clear that up, if your Honor please?

The Court: Just a minute. Let the reporter look at his notes. It may be of help to you also.

Mr. Cooper: All right, your Honor.

(Record read as requested, by the reporter.)

The Court: That is broad enough to include the entire period of the contract.

Mr. Roth: Yes. I missed it before.

The Court: Now, that question prompts another, or at least that testimony suggests another question. Having in mind the testimony of at least one, if not more, of the witnesses called by the defendant, to the effect that that particular executive was aware of the fact that the plaintiff was a member of the Civil Air Patrol at least for a period of some months prior to April, 1943—

Mr. Roth: May I suggest to the court—

The Court: Just a moment. Let me finish the question. Is it the position of the defense that at no time prior to April, 1943, was it aware of the fact that the plaintiff, upon occasions, engaged in a type of activity apparently connected with the Civil Air Patrol, which took him away from Los Angeles?

Mr. Cooper: If your Honor please, that I am unable to [293] answer. I will state, however, the reason the question was asked, and, very frankly, why I inquired particularly. The burden of proof is on the plaintiff to show that he, at all times, was ready, able and willing to perform. It is the testimony of the plaintiff on the witness stand that he didn't know where he was during that period of time, and it will be our contention that the plaintiff has failed to prove that he was ready, able and willing to perform. Plaintiff must prove that he was in Los Angeles during that period of time. And, assuming, may it please the court, that it will be the contention that there may have been a waiver in the past of the provisions of the contract, a waiver of prior breaches, and not a waiver of subsequent breaches, that has particular reference, if your Honor please, to the period between May 18th and May 29th, and—

The Court: Having in mind that we have asked for certain information, I would like to inquire as to when

we might expect a response, either in the form of a stipulation or evidence in some shape.

Mr. Cooper: If your Honor please, I am satisfied that, with respect to the information your Honor wanted from Universal, that we could have that in written form, in a form, I am satisfied, that plaintiff would stipulate to, some time this afternoon or tomorrow. With respect to the questions addressed to plaintiff, we have caused an investigation to be made of the whereabouts of the plaintiff during [294] that period of time, by private investigators, but we have been unable to obtain all of the specific information that we wanted, and possibly, with plaintiff's assistance, we can find out the facts, for the benefit of both parties.

Mr. Roth: Your Honor will recall that Mr. Cummings testified yesterday that he thought all that could be ascertained, as to where he was on different days, from a log which was kept at Oxnard. I assume we should adjourn, to get that information within 24 hours and have it here. Of course, if we have that information we will be happy to furnish it. But I want to state at this time that we do not agree with the position which the defendant has just asserted, that the plaintiff had to be ready, willing and able at all times. We know there is a provision in the contract which requires him to be available. We also know that the contract provides that he is supposed to give notice; and Mr. Cooper introduced a writing, signed by Robert Cummings, which shows that the notices have to be sent to Oscar Cummins, and Robert Cummings himself testified that he could have been in Arizona and Northern California and back in Los Angeles on the same days. And the fact that he may have been in and out of Los Angeles we consider of no great importance to the case, if he was in touch with

Los Angeles and in touch with the place where the notices of the defendant would have to be sent. That is as to availability. There is nothing in the contract which requires the plaintiff to be physically present [295] in Los Angeles at all times.

The Court: Perhaps I should have enlarged the inquiry to show not merely the dates when the plaintiff was absent from Los Angeles, but the places where he was when he was absent. I think, in fairness to both sides, I should point out why I am interested in these matters that have to do with the period antedating April, 1943. We are all familiar with the principle that it is rather the course of conduct of the parties than their words which most likely reflects the truth. We know that, in spite of the claims of some police authorities that there is no mechanism, physical or mental, whereby one can say with certainty whether an individual, whether he be on the witness stand under oath or elsewhere, is telling the truth. Naturally, the longer we are engaged in the courtroom the more likely we are to become proficient at least in applying those psychological tests, that we know are not infallible. We get our impressions from the manner of witnesses on the stand, how they react, and also from observing in the courtroom others who apparently are involved in or affected by the testimony being given on the stand, but even then one can be mistaken. We naturally seek to test the statements by their reasonableness and various other factors. It has been, at least, my personal experience that the safest of all, shall I say, devices or tests is what the parties did when they were not expecting a lawsuit. At least I had some questions in my mind that I [296] think I can help resolve by getting this additional data from both sides.

Mr. Roth: We will be glad to get it, your Honor. I was going to suggest this to Mr. Cooper. In order to avoid putting Robert Cummings back on the witness stand—I don't know what the condition of his log is at Oxnard. Is that where it is—at Oxnard?

Mr. Robert Cummings: Yes.

Mr. Roth: If we had a transcription of that log made, we could phone for it and have it sent down here.

Mr. Cooper: We can have Mr. Addison drive him up.

Mr. Roth: Is he an investigator?

Mr. Cooper: That is the investigator.

Mr. Roth: He is good company, Mr. Cummings.

Mr. Cooper: He is a pretty nice fellow.

The Court: Then, too, if we can get that, say, by tomorrow, it occurred to me, while these matters are reasonably fresh in our minds, that we might have the case argued.

Mr. Cooper: Today?

The Court: No—after this evidence is supplied.

Mr. Cooper: Then may I make this suggestion, if your Honor please: I am satisfied that we can have that information—don't you think we can have it by tomorrow morning? Can you leave this afternoon?

Mr. Robert Cummings: I may possibly be able to get someone in Oxnard to go there and get it. It may be possible [297] to do that without having to go.

Mr. Roth: We will arrange one way or another with Mr. Cooper to get that this afternoon and have it here tomorrow.

Mr. Cooper: And we will have the information that your Honor wants tomorrow morning.

Mr. Roth: I would like to have that.

Mr. Cooper: We will phone you.

The Court: Then can we have the argument tomorrow?

Mr. Cooper: I hope so, because I have a trial on Tuesday, and I have a lot of work yet unfinished.

Mr. Roth: It is satisfactory to me. May I suggest this: We have both filed rather voluminous briefs here.

Mr. Cooper: Too voluminous on both sides.

Mr. Roth: I imagine too voluminous on both sides, and, rather than argue questions of law, I don't feel that there is much that I can add to the legal analysis I have already submitted. If the court asks questions, of course I would want to answer those questions. But I felt that the argument should be confined to the facts, the evidence submitted, and such legal conclusions and principles as we want to draw from the facts or apply to the facts. But I am ready, if the court deems that it will be in the least helpful, to argue the case, both from its legal standpoint and from its factual standpoint.

The Court: Essentially I think the argument ought to deal with the facts, and I think, as a part of the argument, [298] either at its inception or at its conclusion, that each of you might, by way of explanation, outline what we will probably call the principal probative facts that you contend have been established by the evidence, and which, if true, would warrant the application of one or more of the legal principles which are suggested in the pre-trial briefs.

Mr. Roth: That is entirely satisfactory to me.

Mr. Cooper: That is entirely satisfactory. If your Honor please, there is one thing. There have been one or two points raised that I have not touched upon, and I would perhaps like the privilege of arguing those orally, with such additional authorities as I have at that time.

The Court: I probably omitted to say that if you feel that the briefs have raised some legal questions upon which you wish to comment, naturally you will be free to do so. Then the case will be resumed in the morning at 10:00 o'clock.

Mr. Cooper: Very well.

Mr. Roth: Before we go: Do I understand that the court wants this log from the time Mr. Cummings went into the Civil Air Patrol up to the present time?

The Court: That is correct. It is not clear in my mind whether the log discloses the places as well as the dates.

Mr. Roth: If it does, we will have that information.

The Court: Very well.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., Friday, January 7, 1944.) [299]

— — —

Los Angeles, California, Friday, January 7, 1944; 10 A.M.

(Parties present as before.)

The Court: May I inquire of counsel, relative to Defendant's Exhibit A—perhaps counsel would like to look at it—is that a mimeographed form?

Mr. Cooper: Signed by Robert Cummings.

The Court: And where was such form prepared?

Mr. Cooper: I do not know, but I assume it was probably prepared in the studio. I don't know, but I will find out, if the court please. I have the fact now, if your Honor please. I will have to offer a stipulation.

I have been informed that this form is prepared at the studio.

Mr. Roth: That is stipulated.

The Court: Now, are we to have some further stipulations or evidence?

Mr. Cooper: If your Honor please, pursuant to your Honor's suggestion, we have had prepared, and have handed counsel a copy, a record of Robert Cummings' services under the contract of November 21, 1938, showing the first photoplay in which he portrayed a role, beginning in May of 1941 (1939), to and including the last date of his services, which was March 23, 1943, and we show the actual days that he worked. It is our understanding that your Honor was interested in the time since Pearl Harbor, particularly. Counsel has a copy of that. Will your Honor inform me if it [300] covers the points that your Honor has in mind?

Mr. Roth: And we have, may it please the court—

The Court: Before you go into the next matter, may I inquire whether the dates noted on this document just handed to me approximately include the entire period during which the plaintiff rendered any type of services connected with the particular picture referred to?

Mr. Cooper: Do you mean—

The Court: In other words, do these dates relate only to what I have heard described as the shooting period, or do they include something more than that?

Mr. Cooper: I will inquire. If your Honor please, Mr. Muhl has heretofore been sworn, and he may answer that question.

The Court: Very well. [301]

EDWARD MUHL,

a witness heretofore duly sworn on behalf of defendant, upon being recalled, testified as follows:

The Witness: Those dates represent the commencement and the finish of the shooting period. Conferences or discussions, or anything like that, would not be shown there.

The Court: Do your records disclose the periods when the plaintiff appeared at the studio in connection with these other matters, these other services?

A. No, sir; I don't believe there would be any consistent record of that. This is a production office record, which actually is taken from the history of the shooting. Mr. Cummings might have come to the studio voluntarily or in response to telephone calls, or to see somebody, from time to time, and there wouldn't be any record; it wouldn't show visits of that sort.

The Court: Suppose you take the stand again.

The Witness: Yes, your Honor.

The Court: I gathered from the testimony already in the record that an actor, such as the plaintiff, would devote time toward rendering services in connection with a picture preliminarily to the actual shooting thereof, and likewise following the completion of the shooting of the picture. Don't you have any records to indicate when, for example, the artist is at the studio in connection with these preliminary and later services? [302]

A. Well, I believe there would be no consistent record. For instance, if I understand you correctly, you

are referring to appearances for discussions of a role with a director or producer, or perhaps fittings for wardrobe, or appearing for the taking of publicity photographs and things of that sort, when those things would take place in different departments, and, to the best of my knowledge right now, the only record showing the presence of the actor on the studio lot would be the gate record, that is, as to whether he drove in on the lot that day, and what time he came in and went out, and the departments themselves would normally go through and do whatever work was necessary without keeping a register of it, of who appeared. My understanding was that we wanted a record of the appearances in connection with the shooting of the photoplay.

The Court: As a matter of fact, my inquiry was intended to be more comprehensive.

Mr. Cooper: That was my fault, your Honor. Those were the instructions that I gave them.

The Court: In other words, even if you furnished a copy of what you call your gate records, there would be no way of telling from such entries whether the artist came in at the request of the studio or merely because he was supposed to come there and talk about something.

A. That is correct. The record wouldn't show that; it wouldn't show the purpose of his presence on the lot. If I [303] can volunteer this information, I think everyone concedes that this is correct, that during the shooting period an actor generally reports in response to a telephone call, and in connection with the publicity department's use of his services, and most of those appear-

ances would be in response to an informal telephone request from the person or department for his presence, and he would normally report in response to that request.

The Court: Does your studio have a record, for example, of when such requests are made by any of the departments other than, say, the department that is engaged in actually shooting the picture?

A. No, sir. I am quite sure I would be unable to create or get together any kind of a positive or definite or satisfactory record as to those, what we might call, collateral services.

The Court: Then, as I understand it, this document gives the opening date and the closing date of the shooting of each of the pictures listed in the document?

A. Yes, your Honor. And commencing in May, 1941, down a little toward the bottom of the record, the actual days when he was present and when he was not required to be present, etc., are shown.

The Court: So that we will have the record clear, let us first mark the document as defendant's exhibit next in order. It will become Defendant's Exhibit E. [304]

[DEFENDANT'S EXHIBIT NO. "E"]

1-6-44.

ROBERT CUMMINGS

Contract of November 21, 1938

Record of services rendered in:

| | Started | | Finished |
|----------------|---------|----|----------|
| "The Underpup" | 5-15-39 | to | 7-7-39 |
| "Rio" | 8-11-39 | to | 9-1-39 |

20th Century-Fox Loanout:

| | | | |
|-------------------------------|---------|----|----------|
| "Everything Happens At Night" | 9-11-39 | to | 10-26-39 |
| "Charlie McCarthy, Detective" | 11-1-39 | to | 12-11-39 |

Loew's Incorporated Loanout:

| | | | |
|----------------------------|---------|----|---------|
| "And One Was Beautiful" | 2-8-40 | to | 3-2-40 |
| "Private Affairs" | 4-11-40 | to | 4-24-40 |
| "Spring Parade" | 6-8-40 | to | 8-12-40 |
| "One Night In The Tropics" | 8-28-40 | to | 9-30-40 |

Loew's Incorporated Loanout:

| | | | |
|-----------------|----------|----|---------|
| "Free And Easy" | 12-23-40 | to | 1-11-41 |
| | 1-24-41 | to | 1-31-41 |

Frank Ross-Norman Krasna Loanout:

| | | | |
|----------------------------|---------|----|---------|
| "The Devil And Miss Jones" | 1-13-41 | to | 2-12-41 |
|----------------------------|---------|----|---------|

| | | | |
|---------------------------|---------|----|---------|
| 20th Century Fox Loanout: | 3-11-41 | to | 4-11-41 |
|---------------------------|---------|----|---------|

[248]

(Defendant's Exhibit E)

| | Days Worked | Days Off |
|-----------------------|--|---|
| "It Started With Eve" | May, 1941
27, 28, 29, 31 | May, 1941
30 Holiday |
| | June
2, 3, 4, 5, 6, 7, 14,
16, 17, 18, 19, 20,
21, 22, 28, 29, 30 | June
1 Holiday
8 Sunday
9, 10, 11, 12, 13
15 Sunday
23, 24, 25, 26,
27 Sunday |
| | July
1, 2, 3, 5, 8, 9, 10,
11, 12, 14, 15, 16,
17, 18, 19, 21, 22, 23 | July
4 Holiday
6 Sunday
7
13 Sunday
20 Sunday |
| At Warners: | 24 and 25 | |
| "It Started With Eve" | 26, 28, 29 | 27 Sunday |
| At Warners: | 30 | |
| "It Started With Eve" | 31 | |
| | August
1, 2 | August
3 Sunday |
| At Warners: | 4 | |
| "It Started With Eve" | 5, 6, 7, | |
| At Warners: | 8, 9, 11, 12, 13, 14,
15, 16 | 10 Sunday
17 Sunday |
| "It Started With Eve" | 18, 19, 20, 21, 22, 23 | 24 Sunday |

Defendant's Exhibit E)

| | | | |
|--------------------|------------------------|--------------------|---------|
| At Warners: | 25, 26, 27, 28, 28, 30 | 31 | Sunday |
| | September | September | |
| At Warners: | 2, 3, 4, 5, 6, | 1 | Holiday |
| | | 7 | Sunday |
| "Started With Eve" | 8, 9, 10, 11, 12 | 13 | |
| | | 14 | Sunday |
| At Warners: | Sept. 15 to Oct. 7, | October 8, 1941 to | |
| | 1941, inclusive. | December 17, 1941 | |
| | | | [249] |

| | Days Worked | Days Off |
|----------|----------------------|--------------|
| aboteur" | 1941 | 1941 |
| | December | December |
| | 17, 18, 19, 20, 22, | 21 Sunday |
| | 23, 24, 26, 27, 28, | 25 Holiday |
| | 29, 31 | 28 Sunday |
| | | 30 ill |
| | January 1942 | January 1942 |
| | 2, 3, 5, 6, 7, 8, 9, | 1 Holiday |
| | 10, 12, 13, 14, 15, | 4 Sunday |
| | 16, 17, 19, 20, 21, | 11 Sunday |
| | 22, 23, 24, 26, 27, | 18 Sunday |
| | 28, 29, 30, 31 | 25 Sunday |
| | February | February |
| | 2, 3, 4, 5, 6, 7, 9, | 1 Sunday |
| | 10, 11, 12, 13, 14, | 8 Sunday |
| | 16, 17, 18, 19, 20, | 15 Sunday |
| | 21, 26, 27, 28 | 22 Sunday |
| | | 23, 24, 25 |

(Defendant's Exhibit E)

March

2, 21,

March

1 Sunday

3 to 20 inclusive

Mar. 22 to Apr. 27,
incl.

"Between Us Girls"

April

28, 29, 30

May

1, 2, 4, 5, 6, 7, 8, 9,

12, 13, 14, 15, 16,

18, 19, 20, 21, 22,

25, 26, 27, 28, 29

May

3 Sunday

10 Sunday

11 off

17 Sunday

23 off

24 Sunday

30 Holiday

31 Sunday

June

1, 3, 4, 5, 6, 8, 9,

10, 11, 12

June

2

7 Sunday

13 off with per-
mission, for
services in
C.A.P.

14 Sunday

15, 16, 17, 18, 19,
20

21 Sunday

22, 23, 24

28 Sunday

30

25, 26, 27, 29

(Defendant's Exhibit E)

| July | July |
|---------------------|---------------------|
| 13, 14, 15, 16, 17, | 1, 2, 3, |
| 18, 20 | 4 Holiday |
| | 5 Sunday |
| | 6, 7, 8, 9, 10, 11, |
| | 12 Sunday |
| | 19 Sunday |
| | [250] |

| | Days Worked | Days Off |
|--------------------------------|-----------------------------------|-----------|
| Warners "Princess
O'Rourke" | July 21, 1942 to
Sept. 8, 1942 | |
| "Flesh And Fantasy" | 1943 | 1943 |
| | March 10, 11, 16, | March |
| | 17, 18, 19, 20, | 12, 13 |
| | 22, 23, | 14 Sunday |
| | | 15 |
| | | 21 Sunday |

[Endorsed]: Case No. 3242. Cummings vs. Universal.
Deft's Exhibit "E" in Evidence. Date: 1/7/43. Clerk,
U. S. District Court, Sou. Dist. of Calif. Louis J. Somers,
Deputy Clerk. [251]

(Testimony of Edward Muhl)

I notice on the last page of Defendant's Exhibit E a listing of a picture as "Warner's 'Princess O'Rourke,'" and under the column headed "Days Worked" is a blank, and under the column headed "Days Off" is the entry July 21, 1942, to September 8, 1942. Is that accurate?

The Witness: May I see it?

Mr. Cooper: Here is the original of it. I saw the picture, so he must have worked in it.

The Witness: I was just looking at it. I think the title on that is just out of line, because he was working in two pictures simultaneously.

Mr. Cooper: I apologize for overlooking that, if your Honor please.

The Court: Well, the purpose of the court is to clarify matters of that kind.

The Witness: It is the wrong column. Do you have your copy?

Mr. Roth: Yes.

The Witness: He worked in "Princess O'Rourke"—that should be shifted into the lefthand column. Can I write on this, Mr. Cooper?

The Court: Will you let me have that? What do you say the correct answer should be?

A. He was working in the Warner Bros. picture "Princess O'Rourke" from the 21st of July, 1942, until the 8th of September, 1942. [305]

The Court: Now, should there be anything listed under the heading "Days Off" opposite the picture "Princess O'Rourke"?

A. No. This was at another studio, and we don't have the actual days when he was required to render services and when he was off.

(Testimony of Edward Muhl)

The Court: The dates July 21st and September 8th do not necessarily mean that he worked all of those days?

A. Not necessarily.

Q. By Mr. Cooper: You do not have the record of the actual days he worked and the actual days off?

A. No, I have no record of that.

The Court: For the purpose of the record, let it be shown that I have written in on the last page of Defendant's Exhibit E, under the column entitled "Days Worked," opposite "Warners 'Princess O'Rourke,'" the following, "July 21, 1942, to Sept. 8, 1942," and I have crossed out, in the column headed "Days Off," the notation reading to the same effect. I have no further questions.

Mr. Roth: I think I have one more.

The Court: Very well.

Cross-Examination

Mr. Roth: Mr. Muhl stated that he thought we would all concede that when shooting commenced the notices were by telephone, and that calls such as for wardrobe, publicity, conferences, etc., they were by informal telephone. I don't think I knew that. Is that correct? [306]

A. Informal telephone calls?

Q. By Mr. Roth: In one case they were by telephone, you said, and in the other case by informal telephone call.

A. I didn't mean to distinguish between the two. I meant that, for instance, we tell an artist what time to report on the set in the morning; no formal notice is given; or the director will telephone him and say, "Will you be on the set at 9 o'clock?"

(Testimony of Edward Muhl)

Q. But when you are about to start shooting you actually send a formal notice to the artist of the date, and any other calls for service you just call him by telephone; isn't that so?

A. That can happen in more than one way, Mr. Roth. We might send a formal notice, or a letter, or, if the artist has been in and conferred with you about it and it is well understood what time the services are going to start, they may just come in or be advised by telephone. There isn't any absolute rule on the thing.

Q. The usual procedure is to notify the artist in writing of the formal shooting dates, and with respect to other services the usual procedure is to notify him by telephone?

A. I would say there is no usual procedure of notifying an artist in writing when a role is to commence.

Q. Then it is just as usual to call them by telephone as it is to give them written notice? [307]

A. Yes.

Mr. Roth: That is all.

Mr. Cooper: No further questions. I have one or two further questions.

Redirect Examination

Q. By Mr. Cooper: For example, do you recall an occasion between the dates of January 8, 1943, and February 23, 1943, of sending a formal notice to this particular plaintiff to come in for discussion?

A. Between what dates?

Mr. Roth: We object to that question as improper examination of any kind, and it is not the best evidence.

Mr. Cooper: Well, if it is that important I will get at it—

Mr. Roth: I didn't say it was important.

(Testimony of Edward Muhl)

Mr. Cooper: May I be permitted to put the question and have the court rule on it? The point of the question is this: Counsel inquired with respect to whether it was usual to send a written notice or to telephone with respect to other services. Let me ask you this:

Q. Do you recall ever sending a written notice for this plaintiff to come in for discussion in connection with the role of—

Mr. Roth: Objected to as not the best evidence and not a proper question to inquire about at this time.

The Court: If it deals with the subject matter of a [308] written notice, it would appear that the question really avoids the requirements. The writing itself should be shown.

Mr. Cooper: I think your Honor is correct on that.

Q. By Mr. Cooper: Let me ask you this question: With respect to notices for discussions and wardrobe and things of that sort are there occasions with respect to sending the notices, when you send them sometimes by telephone and sometimes by written communication?

A. Yes.

Q. And, particularly if there is a dispute of some sort, what happens in that sort of a situation?

Mr. Roth: That is objected to as incompetent, irrelevant and immaterial.

Mr. Cooper: If your Honor please, the point I want to show is that there is a usual rule in such a situation.

The Court: Very well. You may answer.

A. If there is some reason to believe that the artist or employee will not respond to the notice, it may be sent in writing, so as to have evidence of the notice having been given. If there is no reason to believe or anticipate

(Testimony of Edward Muhl)

that there will be any difficulty, normally the telephone is resorted to. It is just a matter of reasonable action.

Mr. Cooper: That is all.

Mr. Roth: That is all.

The Court: Now, is there something further?

Mr. Roth: Yes, your Honor. Yesterday at the close of the [309] session the court suggested that we submit the amount of time that had been spent by the plaintiff in his activities in the Civil Air Patrol since being a member of that service, and we have here the log book of Robert Cummings, which shows all his flying time and where he was on particular dates since the 23rd day of May, 1942. We have the original log book, and from the original log book we have transcribed the entries therein, in typewriting, and are prepared to hand it up to the court. They are exact in all particulars. There is only one deviation from the entries in the book, and that is on page 5, line 5, where there is added, after the entry 5-28-43, "Returned to Los Angeles in CAP truck the same evening." The language "Returned to Los Angeles in CAP truck the same evening" has been added. Mr. Robert Cummings told me that that was added because he was asked specifically where he was on that evening or on that day, while on the witness stand, and he remembered by looking at his entries, and added it. Otherwise, the typewritten transcript is the same as the entries in the log. We are willing, of course, to hand the log book up to the court, as well as the typewritten entries therefrom, but we would like to have the log book after the court has finished. We have given a copy of the transcript to counsel.

The Court: May I see the book and the copies? May I ask the plaintiff to take the stand.

Mr. Roth: He just stepped out for a moment. I will get [310] him.

The Court: Would you take the stand, Mr. Cummings?

ROBERT CUMMINGS,

a witness heretofore duly sworn, was recalled and testified as follows:

The Court: Looking at this log book, which we have been told was kept by yourself, is there anything therein that enables you to determine when you began flying as a member of the Civil Air Patrol?

A. Your Honor, the log book wasn't always kept by myself. In other words, sometimes when I flew I would note down the time I flew, as most flyers do, because their log book is very valuable to them and they don't wish to lose it, because it is the only record of their flying time, and this was kept by my wife, because I would bring her home the record of the time I flew, as to the hours and minutes and where I flew, and I would say, "Put this in the log book," and she recorded it there. There is no way in there that I can tell when I joined the Civil Air Patrol, and it would necessarily mean that you are flying at the time. In other words, for a person to join the Civil Air Patrol today it might be said that before he could get an opportunity to fly with them he would have to, first of all, be O.K.'d through Washington and the F. B. I. and checked down the line, and then he would have to go to one of the fields where they fly and [311] have their training and be O.K.'d by possibly the squadron commander or the executive officer, to be allowed to fly.

(Testimony of Robert Cummings)

As a matter of fact, for a long time after Pearl Harbor, and I believe up until possibly May, I did no flying at all, as I remember. We were here in Los Angeles. All flyers were grounded in this area at that time. Even the Civil Air Patrol, which was an organization primarily designed to aid the Army and Navy, from a civil standpoint, the Civil Air Patrol was not allowed to fly in this area. So there is no way actually in that log that I could say when I joined the Civil Air Patrol.

The Court: Now, is it your best recollection that by May of last year you had joined the Civil Air Patrol?

A. May of last year? That would be 1943.

The Court: May of 1943. That is right. This is 1944. The question is, is it your best recollection that by May of 1942, in other words, within, say, five months after our entry into the war, or, as it is commonly referred to, after Pearl Harbor, would you say that you had joined the Civil Air Patrol?

Mr. Cooper: If your Honor please, I have something that may help the witness to refresh his recollection.

Mr. Roth: Just a moment. We don't care for an independent investigation. It is just the witness' recollection.

Mr. Cooper: Counsel, I am in entire good faith. I am sure you will have no objection to it at all when you see it. [312]

Mr. Roth: Unless the witness asks for it, I don't think it should be shown to him, because Mr. Appleton's report, which I have never seen, is undoubtedly based on hearsay, and he is not here to testify.

The Court: I have no other questions.

(Testimony of Robert Cummings)

Cross-Examination

Q. By Mr. Cooper: Mr. Cummings, if I suggest to you that the records of group 918, that is, the local section, show that you were a member of the Patrol on May 29, 1942, would that assist you possibly in fixing approximately how long before that you became a member of the Civil Air Patrol?

A. Yes, that would, because of the fact that I was earlier in what was the first Civil Air Patrol squadron, Sheriff Eugene Biscailuz's squadron, which was a group of civil flyers in this area, who used to volunteer their services in time of need, in earthquake, flood or anything, to drop food or anything to people who needed it. I joined the sheriff's air squadron, and that became the first unit of the Civil Air Patrol. That became the first unit of the Civil Air Patrol, because of the fact that they had had more experience in that line of work than anyone else, and when they, as a group, joined the Civil Air Patrol, I went in with them, and the records became pretty few after a while, as I remember, because many of the men in that air squadron were going into the Army, due to Reserve commissions and whatnot, and many of the officers who kept the records have [313] had to leave, and they were handed from one person to another, until, as I remember, I had to make another application for the Air Patrol, as even after I had been notified from Washington, I received word again that I would have to fill out other forms, because they had been lost. But I do know that in May I was a member of the Civil Air Patrol, because, shortly after that, I was asked to take over the command of the squadron, 918-4, which covered the entire San Fernando Valley.

(Testimony of Robert Cummings)

Mr. Cooper: I think that is all, your Honor.

The Court: Anything further?

Mr. Roth: I don't think so.

Mr. Cooper: Your Honor made inquiry yesterday with respect to certain testimony which your Honor desired to have read, and counsel and I have communicated with the reporter, who, I believe, has his notes available on the subject your Honor inquired about.

The Court: The reporter advised me this morning in chambers that he had read over portions of his notes, and apparently had not completed his own reading of the portions desired. I think it would be preferable to proceed with the oral argument, and, in the event that it develops that we need to make further reference, we might then turn back to the reporter's notes. First of all, I daresay we should give an exhibit number to this copy of the flying log of Mr. Robert Cummings. Mr. Clerk, you might return the original [314] log book. We will mark the transcript therefrom as plaintiff's exhibit next in order. That will be No. 3.

[PLAINTIFF'S EXHIBIT NO. 3]

FLYING LOG OF ROBERT CUMMINGS 1942 & 1943

- 5-23-42 (Time: 1 hr., 27 min.) First flight since war.
 Flew over Boulder (City). Shot landings.
- 5-24-42 (Time: 1 hr., 9 min.) Flew to Las Vegas.
 Carried 6 pass. on many trips.
- 8-16-42 (Time: 3 hrs., 20 min) Flew to check Lone
 Pine Field for C. A. P. with Bachtel.

(Plaintiff's Exhibit No. 3)

9-12-42 (Time: 2 hrs. 21 min.) Local and to Kingman and return.

9-13-42 (Time: 3 hrs.) To Blythe and return with Bachtel for C.A.P.

9-13-42 (Time: 59 min.) Four night landings—night flight.

Boulder City to Las Vegas, Nevada.

9-14-42 (Time: 53 min.) Cross wind landing practice. Boulder City, Nev.

9-14-42 (Time: 15 min.) Local, Boulder City.

9-14-42 (Time: 35 min.) Ferried Tank for Bill for 1 night landing.

Boulder City to Las Vegas.

10-11-42 (Time: 47 min.) Checked out in Culver. Boulder City.

10-11-42 (Time: 1 hr., 10 min.) Local with Lundgren and Dunavant.

Boulder City.

1-12-42 (Time: 1 hr., 14 min.) 6 Pass. over. 3 back. Boulder City to Kingman.

10-30-42 (Time: 1 hr., 44 min.) C.A.P. Ferry Lane opening Los Angeles to Blythe.

Boulder City to Blythe, Calif.

10-31-42. (Time: 51 min.) Flying C.A.P. members. Blythe.

10-31-42 (Time: 1 hr., 22 min.) Local flight Blythe in Taylorcraft.

11-1-42 (Time: 31 min.) Ditto.

(Plaintiff's Exhibit No. 3)

11-1-42 (Time: 30 min.) Local flight Blythe in Cub.

11-1-42 (Time: 1 hr., 3 min.) Flying C.A.P. members.

Blythe.

11-1-42 (Time: 1 hr., 35 min.) Return from Ferry lane.

Blythe to Boulder City.

11-6-42 (Time: 2 hrs., 25 min.) 2nd week — Ferry lane C.A.P.

Boulder City to Blythe.

11-7-42 (Time: 1 hr., 4 min.) C.A.P. flying.
Blythe.

11-8-42 (Time: 1 hr., 30 min.) Return from Ferry lane.

Blythe to Boulder City. [238]

11-16-42 (Time: 1 hr., 19 min.) XC. bringing Whitman's ship to King.

Blythe to Kingman, Ariz.

11-20-42 (Time: 1 hr.) Practice all maneuvers up to pylons.

Kingman.

11-21-42 (Time: 1 hr., 1 min.) Pylon 8s. (signed)
Richard L Pogue C-106602.

Kingman.

11-22-42 (Time: 1 hr., 35 min.) Pylons and spins.
Kingman.

11-23-42 (Time: 1 hr., 9 min.) Stalls power on & off—
8s—S—Turns.

Kingman.

(Plaintiff's Exhibit No. 3)

11-24-42 (Time: 1 hr., 40 min.) Series of turns, chandelles, 8s—S—Turns—slip.

Kingman.

11-25-42 (Time: 1 hr., 3 min.) 8s—and turns.

Kingman.

11-26-42 (Time: 1 hr., 40 min.) Procedure practice.

Kingman.

11-27-42 (Time: 1 hr., 7 min.) Procedure practice.

Kingman.

11-28-42 (Time: 1 hr., 13 min.) Practiced low to high work solo.

Kingman.

11-29-42 (Time: 1 hr., 17 min.) Practiced procedure low & high solo.

Kingman.

11-30-42 (Time: 1 hr., 3 min.) Low and high work.

Kingman.

12-1-42 (Time: 1 hr., 10 min.) Low & high practice.

Kingman

12-2-42 (Time 1 hr.) Low & high work.

Kingman

12-3-42 (Time: 1 hr.) Chandelles, lazy 8s, stalls, overhead approach

Kingman

coordination ex

12-4-42 (Time 55 mins.) Flew at 9800'—cold—

Kingman to Boulder City.

(Plaintiff's Exhibit No. 3)

12-4-42 (Time: 53 min.) Returned to Kingman
weather lousey.

Boulder City to Kingman.

12-5-42 (Time: 1 hr.) Spins lazy 8s chandelles.
Kingman.

12-5-42 (Time: 45 min.) Lt. Dolan, Audaboni & Ben-
net passengers.

Kingman.

12-6-42 (Time: 1 hr., 17 min) XC King. to Boulder, 3 passengers.

Kingman to Boulder City.

12-6-42 (Time: 42 min.) XC test hop at Vegas of 8 min.

Boulder City to Las Vegas.

12-7-42 (Time: 45 min.) Practice with instructor.
Boulder City.

12-8-42 (Time: 1 hr.) Ditto
Boulder City.

12-9-42 (Time: 1 hr., 20 min.) XC to Boulder and
return.

Kingman to Boulder City.

12-11-42 (Time: 1 hr., 32 min.)

Kingman to Boulder City.

12-13-42 (Time: 1 hr., 29 min.)

Kingman to Boulder City.

12-14-42 (Time: 45 min.)

Kingman to Boulder City.

12-12-42 (Time: 1 hr.) Procedure practice.
Boulder City. [239]

(Plaintiff's Exhibit No. 3)

12-16-42 (Time: 47 min.) Flew with Vivi.

Boulder City.

12-17-42 (Time: 45 min.) With Edwards.

Boulder City.

12-18-42 (Time: 52 min.) “ “

Boulder City.

12-27-42 (Time: 1 hr., 15 min.) Procedure practice.

Boulder City.

12-28-42 (Time: 1 hr.) “ “

Boulder City.

12-29-42 (Time: 50 min.) “ “

Boulder City.

12-29-42 (Time: 45 min.) Took Barre for a ride in side
by side.

Boulder City.

12-30-42 (Time: 1 hr., 45 min.) one hour solo practice,
45 minutes duo.

Boulder City.

12-41-42 (Time: 1 hr., 10 min.) Dual procedure prac-
tice.

Boulder City.

12-31-42 (Time: 1 hr., 30 min.)

Boulder City.

12-31-42 (Time: 47 min.) H. P. rating (15 min. Pete—
32 “Thomas”).

Boulder City.

(Plaintiff's Exhibit No. 3)

1-3-43 (Time: 3 hrs.) XC on trip to S.F. for Hogan's plane.

Bus. trip.

Boulder City to Sky Ranch, Reno, Nevada.

1-6-43 (Time: 2 hrs., 58 min.) Return from S. F.
Very cold. Frost on plane.

Reno, to Boulder City.

1-9-43 (Time: 35 min.) Spin practice.

Boulder City.

1-10-43 (Time: 2 hrs., 13 min.) First commercial
charter trip for hire Mr. Patterson.

Boulder City to Phoenix, Arizona.

1-10-43 (Time: 1 hr., 41 min.) Return trip (tail
wind) excellent trip both ways.

Phoenix to Boulder City.

1-11-43 (Time: 31 min.) Checking Carlisle in Cessna.
Boulder City.

1-12-43 (Time: 38 min.) Practicing spins. Vivi as
balast.

Boulder City.

1-13-43 (Time: 45 min.) Testing Cub after engine
repair Barre pass.

Boulder City.

1-15-43 (Time: 1 hr., 5 min.) Flew Vincentes Cub
Barre passenger.

Boulder City.

1-16-43 (Time: 35 min.) Practicing spin. Vivi as
balast.

Boulder City.

(Plaintiff's Exhibit No. 3)

1-16-43 (Time: 28 min.) Vincentes Cub (high wind)
Barre Pass.

Boulder City.

1-17-43 (Time: 37 min.) Spin practice. Vivi balast.
Boulder City.

1-18-43 (Time: 1 hr., 22 min.) Rac'd instr rating from
CAA. Took Hardy and Miller too.

Boulder City to Prescott, Ariz.

1-19-43 (Time: 1 hr., 25 min.) Return (windshield
broken from cold.

Prescott, Arizona to Boulder City. [240]

1-19-43 (Time: 32 min.) First paying student fee ap-
plied to cost of windshield repair.

Prescott.

3-28-43 (Time: 1 hr., 45 min.) Taught Kellogg—
Wardligh and Heimann.

Las Vegas.

3-28-43 (Time: 3 hrs., 55 min.) " Stocktill—Kel-
logg—Heimann—Smith.

Las Vegas.

4-11-43 (Time: 4 hrs., 17 min.) C.A.P. training of
members.

Quartzite, Ariz., returned to Los Angeles by automobile
that night.

4-11-43 (Time: 42 min.) " " " "
Quartzite, Ariz.

4-11-43 (Time: 35 min.) Airport registrar Jennie De-
laney.

(Plaintiff's Exhibit No. 3)

4-11-43 (Time: 20 min.) C.A.P. training.

4-22-43 (Time: 1 hr., 30 min.) Check flight Osborne
War Eagle Feild.

Lancaster, Calif., returned to Los Angeles same after-
noon.

5-7-43 (Time: 2 hr, 33 min.) 1st C.A.P. Ferry lane
Instructs—Dade.

San Dimas, Calif., to Quartzite, Ariz.

5-8-43 (Time: 1 hr., 20 min.) Chandelles lazy 8s
Vivi—C.A.P.

Quartzite.

5-8-43 (Time: 15 min.) Solo check out Brushaber.

Quartzite.

5-9-43 (Time: 4 hrs., 40 min.) C.A.P. active duty
training instruction.

Quartzite.

5-10-43 (Time: 2 hrs., 48 min.) C.A.P. active duty
C.C. training, Wade.

Quartzite, to San Dimas, Calif.

5-19-43 (Time: 5 hrs., 15 min.) Ferry to Vegas Cour-
ier Fl. #57 to Army Base.

Quartzite to Las Vegas to Blythe to Quartzite.

5-20-43 (Time: 1 hr., 55 min.) Beginning instrument
with Ed Horton.

Quartzite.

5-21-43 (Time: 1 hr., 20 min.) Radio orientation.

Quartzite.

5-21-43 (Time: 45 min.) Helen Vincint instruction.

Quartzite.

(Plaintiff's Exhibit No. 3)

5-22-43 (Time: 2 hrs., 10 min.) Forced landing Push
Rod Conner.

Quartzite.

5-22-43 (Time: 2 hrs., 5 min.) C.A.P. instruction to
918-3.

Quartzite.

5-23-43 (Time: 1 hr.) First fairly good job on radio.
Quartzite.

5-23-43 (Time: 1 hr, 55 min.) C.A.P. instruction to
918-3.

Quartzite.

5-23-43 (Time: 1 hr., 25 min.) " " " " .
Quartzite.

5-24-43 (Time: 30 min.) Forced landing prop. at
Herron.

Quartzite to Blythe. [241]

5-25-43 (Time: 50 min.) Student ride John Mann.
Quartzite, Arizona

5-27-43 (Time: 2 hrs., 6 min.) Good air and orientation
work.

Quartzite, Arizona.

5-28-43 (Time: 1 hr., 30 min.)

Quartzite, Arizona

5-28-43 (Time: 25 min.) Check ride George Hyder.
Quartzite, Arizona. Returned to L. A. in CAP truck
same evening

6-2-43 (Time: 1 hr., 52 min.) C.A.P. instruction C.
Kellog at 6 Hrs.

Quartzite, Arizona

(Plaintiff's Exhibit No. 3)

6-2-43 (Time: 1 hr., 38 min.) Parallel to a fade—
air work.

Quartzite, Arizona

6-3-43 (Time: 55 min.) George Hyder.

Quartzite, Arizona

6-3-43 (Time: 50 min.) Kellogg C. C.A.P. instruc-
tion.

Quartzite, Arizona

6-3-43 (Time: 1 hr.) 90-degree method—air work.

Quartzite, Arizona

6-3-43 (Time: 1 hr., 5 min.) Check Dick Greer for
H.P. of 95.

Quartzite, Arizona

6-4-43 (Time: 20 min.) Started Adelaide Hobbs first
flight.

Quartzite, Arizona

6-4-43 (Time: 52 min.) 90-degree method.

Quartzite, Arizona

6-6-43 (Time: 54 min.) Parallel to a fade.

Quartzite, Arizona

6-6-43 (Time: 1 hr., 5 min.) Instruction to Sam
Davis.

Quartzite, Arizona

6-7-43 (Time: 50 minutes) Instructed Dr. Salter 20
min.

Quartzite, Arizona

6-8-43 (Time: 1 hr., 20 min.) Parallel to a fade.

Quartzite, Arizona

(Plaintiff's Exhibit No. 3)

6-9-43 (Time: 1 hr., 30 min.) X.C. Instruction to
Dr. Salter.

Quartzite to Prescott, Arizona

6-10-43 (Time: 1 hr., 30 min.) Parallel on Ashfork.
Prescott, Arizona

6-10-43 (Time: 1 hr., 55 min.) Salter X.C. instruction.
Prescott to Quartzite, Arizona

6-11-43 (Time: 40 min.) " scraped L. Wing
on Bush.

Quartzite, Arizona

6-11-43 (Time: 46 min.) 1st flight for Lt. Parkharst.
Quartzite, Arizona

6-12-43 (Time: 1 hr., 45 min.) X.C. for Salter.
Quartzite to Pheonix, Arizona

6-12-43 (Time: 45 min.) Parallel to fade on *Phconix*
range.

Pheonix, Arizona

6-13-43 (Time: 2 hrs.) four passenger hops. In-
structed Roley.

Pheonix, Arizona

6-13-43 (Time: 1 hr., 47 min.) X.C. instruction to
Salter.

Pheonix to Quartzite, Arizona

6-17-43 (Time: 1 hr., 25 min.) X.C.—to Pete for check.
Quartzite to Pheonix, Arizona

6-18-43 (Time: 2 hrs.) Check Dave Franks. Ride B.
Roley.

Pheonix, Arizona

(Plaintiff's Exhibit No. 3)

6-19-43 (Time: 1 hr., 40 min.) Passed instr flight test
with inspector.

Pheonix, Arizona

6-20-43 (Time: 2 hrs., 5 min.) Ken Royce Bad Engine.
Pheonix to Quartzite, Arizona

6-28-43 (Time: 1 hr., 15 min.) Check flight Mira-
Loma, Oxnard, Calif.—Entered Instructor's
School Mira-Loma Flight Academy—

[Endorsed]: Case No. 3242. Cummings vs. Universal.
Pltf. Exhibit 3. Date: 1/7/44. No. 3 in Evidence.
Clerk, U. S. District Court, Sou. District of Calif.
Louis J. Somers, Deputy Clerk. [242]

Mr. Roth: There may be one other thing, that is,
in connection with this log, and that is that on the occa-
sions when he was not flying he was in Los Angeles
County.

Mr. Cooper: If that is to be considered testimony, I
would like to have an opportunity to cross examine him
on that.

Mr. Roth: Naturally you would.

The Court: Do you wish to recall the witness?

Mr. Roth: Yes. [315]

ROBERT CUMMINGS,

having been previously duly sworn, was recalled in rebuttal, and testified as follows:

Direct Examination

Q. By Mr. Roth: On the occasions, Mr. Cummings, when you were not actually flying, where did you reside?

A. When I wasn't actually flying, I stayed at my ranch in San Fernando Valley.

Q. Is that in Los Angeles County?

A. I think it is. It is Van Nuys.

Mr. Cooper: We will stipulate that that is in the County of Los Angeles. Yes, that is in the City of Los Angeles.

Q. By Mr. Roth: You have resided there continuously since about December 7, 1941?

A. Yes; that is my residence.

Q. And when you took these flying trips you came back to your place in Los Angeles; is that right?

A. Yes.

Mr. Roth: Cross examine.

Cross-Examination

Q. By Mr. Cooper: Mr. Cummings, referring to your log on May 19, 1943—

A. May I look at it?

Q. Yes, certainly. I notice you were flying and were in Quartzsite, Arizona, flying, on May 19, 1943, May 20, 1943, May 21, 1943, the 22nd, 23rd, 24th, 25th, 27th and 28th. [316] Do I understand you to mean that each night you returned to Los Angeles?

A. No; it isn't necessarily true that every night I returned to Los Angeles, no. Well, I had a little CAP truck, which is a truck from my ranch, that I had donated

(Testimony of Robert Cummings)

to the Civil Air Patrol for our use, and painted it with our colors, and I would drive that to Quartzsite; and I had a small tent, and I used to pitch the tent beside the truck, and I would stay in the tent at night on a cot, because there were no facilities in Quartzsite. And it was very hot on the desert, and I had to carry my own sleeping accommodations everywhere. And then when I would get ready to go into L. A., sometimes, if somebody was there to watch the tent for me and I was sure that they would, I would leave it, and take whatever valuables I had in the truck, and drive in to Los Angeles.

Q. How long would it take you to drive from Quartzsite to Los Angeles?

A. Approximately five and a half or six hours.

Q. I notice that you have made a particular entry on the night of May 28th that you returned to Los Angeles in CAP truck the same evening.

A. Yes.

Q. Do you have some particular way of remembering that?

A. Yes; strangely enough I do have, because this man George Hyder, of whom I speak in the log here, was studying [317] flying down there, preparatory, I believe, to going into some aircraft work, but he was attempting to get a commercial license. I had seen him around the field, and several times he had driven me down to the restaurant where we had to eat in Quartzsite, and he told me that he was studying as hard as he could, but that he was having a little trouble with his navigation and meteorology, and asked me if I had had any experience in that, and I said yes, I did have. And he was staying in what was called the men's dormitory. And he got out his books and papers and started to explain to me

(Testimony of Robert Cummings)

how far he had gotten with his navigation and meteorology. And I said, "Well, George, don't you have a protractor?" And he said, "No, I don't. I tried to get one of those, and I understand they are very necessary." I said, "They are very necessary, because when you take your government test it is necessary to have one. I advise you very strenuously not to go ahead without this protractor." And he said, "I have a friend of mine in Los Angeles who was going to go down to Lietz, where they have navigational equipment, and buy me a protractor, but he hasn't sent it out yet." And I said, "I am going in to Los Angeles tonight, and I will get you a protractor." And he said, "Better telephone my friend and see if he has bought it, and then you won't have to buy a duplicate." So when I got the notes of my time, I had George Hyder's name, and by it was written the time he flew, within a week, and also the record of the plane, and also the [318] telephone number and the name of his friend, who I believe was an attorney—I can't remember now—and he said, "Will you call him," so I called the man, and he said, "Well, I had that protractor sent to George Hyder." And I said, "He hasn't received it and the poor guy is in an awful way. I don't think he is going to be able to pass this test if he doesn't have the proper equipment." And I said, "Shall I go down and get him one?" And he said, "No, I think what I will do is, I will go down and see about this one." And I said, "You will take that responsibility?" And he said, "Yes." And I know I had the thing in my mind, because he was worrying about whether he was going to pass the test or not.

(Testimony of Robert Cummings)

Q. Would you say, to the best of your recollection, that you, in all probability, did not return to Los Angeles between the 20th and the 21st?

A. That is of May?

Q. Yes. A. Fifth month, twentieth day?

Q. 5-21-43.

A. Yes. That I did not return between the 20th and the 21st?

Q. Between the 20th and the 21st.

A. I don't think I did. As a matter of fact, it is likely—on the 20th I was doing some instrument instruction with Ed Horton, and on the 21st also. Usually we flew very [319] early in the morning, because, on instrument instruction, the wind must be pretty good, and I think, since I flew with instruments the next day, it was likely I did not return to Los Angeles between the 20th and the 21st.

Q. Let us get back to the 19th. You were in Quartzsite, Arizona, flying every day, on the 19th, and on the 20th, and on the 21st, and on the 22nd, and the 23rd, and on the 24th and 25th, and then there is a day's lapse in there. A. Yes.

Q. Between the 25th and the 27th. Do you have some recollection as to whether you may have left Quartzsite on the night of the 25th? You do not appear to have flown on the 26th.

A. That is possible, that I did leave there. That doesn't stand out in my mind, whether I did or not. It is possible. The reason I think it is possible is because, being an instructor around a field like that, where people are so avid for instruction, due to the pressing need for flyers, you have got to instruct them. About the only reason I could possibly think of that I didn't fly that day

(Testimony of Robert Cummings)

would be, it seems to me there was a—yes, I do know why we didn't fly that day. There was a forced landing on 5-24-43. The propeller broke on the instrument instruction ship, and I made a forced landing at Herron Field, which is at Blythe, and I think the next day, instead of coming back to the field, we went to Herron and worked all day getting [320] the prop back on that ship, because it put the ship out of commission.

Q. Let me ask you this question, then: Then, to the best of your recollection, you were at Quartzsite continuously from the 19th to the 25th, and then probably on the 26th you were in Herron?

A. Yes. That is very near Blythe.

Q. Just over the border? A. Yes, 27 miles.

Q. Well, to make sure that you didn't return to Los Angeles until the afternoon of the 28th—

A. That is correct.

Q. I notice on April 11, 1943—

A. Yes.

Q. You were in Las Vegas some four hours and seventeen minutes.

A. Wait a moment. Is that on April 11th? Does it say there Las Vegas?

Q. It says so on this.

A. That may be a mistake. 4-11—no; that is a mistake; that is definitely a mistake.

Q. That should be Quartzsite?

A. It should be Quartzsite, because I have a reason to know that I was at Quartzsite that day.

The Court: Do I understand that the transcript is in error? [321]

A. There is an error there, yes.

(Testimony of Robert Cummings)

Mr. Cooper: That is on April 11, 1943, page 4, between lines 6 and 7.

Mr. Roth: What place?

Mr. Cooper: Quartzsite.

The Witness: It was Quartzsite instead of Las Vegas.

The Court: Well, I will make the correction accordingly on the exhibit.

Mr. Roth: It is Quartzsite, under the date and the name of the city?

Mr. Cooper: I notice on that—

The Court: Just a moment. Let us see if we get this correct. Counsel calls attention to the fact that the designation of the locality follows.

Mr. Cooper: Oh, I see.

The Court: The date, in other words, relates to the date immediately preceding. Then we had better not disturb this.

The Witness: Oh, it is correct, then. I didn't realize it.

Mr. Roth: May it please the court, I helped the secretary prepare this, but she inadvertently left out the names of the places that your Honor specifically wanted. You will observe, then, that we went back and had her insert the names of the cities after the instrument was prepared, and wherever it gives a date, such as on the first page, line 15, between lines 15 and 16, where it says "9-13-42," we inserted [322] where Mr. Cummings happened to be at that time, so we therefore inserted "Boulder City to Las Vegas," and all through the entire instrument we had to get it out in that way.

The Witness: I was at Quartzsite on 4-11-43.

(Testimony of Robert Cummings)

Q. I notice on that day you said, "4 hours, 17 minutes, C.A.P. training of members," and then on the same date it says, "Time: 42 minutes," and on the same date, "Time: 35 minutes. Airport registrar Jennie Delaney."

A. Yes.

Q. And also on April 11th, "Time: 20 minutes, C.A.P. training." A. Yes.

Q. I take it that you returned to Los Angeles following this last item?

A. You mean the twenty minutes flying on the 11th?

Q. That is right.

A. Yes, I did return to Los Angeles that night.

Q. Did you drive back? A. Yes.

Q. And do you know what time you left on the 10th of April? A. We left on the 10th?

Q. I don't know where you were on the 10th.

A. You mean in order to get to—

Q. In order to get to Las Vegas. [323]

A. Well, now—

The Court: Why do you refer to Las Vegas again?

Mr. Cooper: It is my mistake again. I mean Quartzsite.

A. Being the squadron commander of a squadron of flyers, we had to plan somehow to get all the people who were capable of flying aircraft to a field at which we could give them instruction in a group, and get them back. The reason we had to get them back was because most of them were workers at Lockheed and various places, so we tried to plan the trip so that it would fall on a Sunday. There were times when we went up on a Saturday, if some of us could get off, if I could get off, and in that way they could fly over Sunday and be back

(Testimony of Robert Cummings)

Sunday night, permitting them to get to work Monday morning.

Q. What I am getting at is this. Did you refresh your recollection as to approximately what time you left on Saturday, if you were in Los Angeles?

A. What time I left Los Angeles Saturday night?

Q. Yes.

A. Well, I can't say truthfully that I remember the exact time. There were times when I knew I came back pretty tired from those trips, and there were times when I couldn't leave Los Angeles until 10:00 or 11:00 o'clock at night, and I would drive with one of the members of the squadron, and I would get there, and they would have a tent pitched for me and take care of me, because I was the only instructor they [324] had, and in the morning they would take me up, and I would get out on the flying line, and the executive officer would have all the planes lined up, and I would start to fly.

Mr. Cooper: That is all.

Redirect Examination

Q. By Mr. Roth: During all the time you were in Quartzsite and other places, were you in constant telephone communication with Oscar?

A. Not constantly.

Q. How often would you telephone him?

A. Sometimes we would talk, might talk, twice a day, or might not talk for two days or three days sometimes, but he knew where I was, and it was just a question if I had anything to talk about, and I wouldn't call if I had nothing to call him about, I wouldn't call.

Mr. Roth: That is all.

The Court: We will have a five-minute recess.

(Short recess.)

Mr. Roth: If your Honor please, normally plaintiff opens and closes in a case, but in this particular matter all of the facts in the complaint have been stipulated except two. One is the nature of the demand which was made on April 10th, and the other is whether any demands or requests were made upon the plaintiff between the dates of April 10th and June 3, 1943, by the defendant. Both of those have been established without contradiction by the evidence, that is, [325] as far as the nature of the demand is concerned. There will be a dispute as to whether or not the telegrams ever arrived. As far as any demands having been made between the 10th of April, 1943, and June 3, 1943, or May 29, 1943, are concerned, there is no contradiction in the evidence. So there are no facts to argue on our phase of the case. There are merely questions of law, which the court will have to decide, and which have been adequately briefed.

The controversy with respect to the facts is on the affirmative defense of estoppel. I think the burden of establishing that defense is, of course, on the defendant, and if, by chance, that is not the case, as far as the defense of estoppel is concerned, if the burden is on us, we waive the opening argument. If it is properly upon the defendant, we will take our proper place.

The Court: May I inquire as to what the plaintiff's position is respecting that portion of the evidence which has to do with the sending of the telegrams bearing date April 10, 1943. I am not speaking as to the legal effect at this moment, though, but what his position is respecting what happened with reference to the delivery of those telegrams; in other words, the bringing home to plaintiff of the contents thereof or the substance of their contents; and also that phase of the evidence which has to do with

ascertaining the true meaning and purpose of the defendant in sending those telegrams. [326]

Mr. Roth: On the question of the telegram itself, that is, the telegram of April 10th, apparently, under the law, presumptive delivery is established by delivery to the telegraph office. Under the law, too, that is a disputable presumption. The uncontradicted facts in the case show this: That on April 12th the Western Union itself sent, via teletype, a wire to defendant, and in that wire Western Union specifically set up the nature of the delivery, and it said in so many words that the telegram was not personally delivered either to Oscar Cummins or to Robert Cummings, but went on to say—I am not quoting it literally—that it was telephoned to various addresses, with no response, that there was no one there, and that they finally reached or phoned Mrs. Oscar Cummins, at a specific address. That is what the telegram of Western Union to the defendant says. Then we put Mrs. Oscar Cummins on the stand, and she testified—and her evidence is uncontradicted—that she never received any such message either on April 10th, April 11th or April 12th. So that is the condition of the record, on the question of that wire, in respect to the court's first question. On the second question—

The Court: Let me interrupt there again. Then I take it your position, in brief, is, on the matter of the delivery of the telegrams or bringing home to the plaintiff the contents thereof, that the presumption which the law creates has been clearly overcome by the very records of the Western [327] Union Telegraph Company?

Mr. Roth: Plus one other thing, your Honor, which I mentioned. That is the testimony of Mrs. Oscar Cummins. And plus something which I didn't mention, which I men-

tion now, and that is the uncontradicted testimony of the witnesses Kelley, Muhl, Ward and Speers, that after the wire of April 10th was sent nothing further was done to notify either Robert Cummings or Oscar Cummins. On the second question that the court asked, as to what was in the mind—

The Court: As to what we may fairly construe to be the real purpose of that telegram.

Mr. Roth: That, of course, is arguable from the facts, if we desire to go into the facts. At this time, because of evidence which is in the record, certain things can be argued as to what was in the defendant's mind. Irrespective of what is in the record, plaintiff is satisfied to rest, as far as this argument is concerned, on the telegram itself, and on the notices which followed it, if the subject is opened up. I merely say that because, if it is argued by the defense, there are certain matters which I will argue from the facts in respect of the meaning of that wire of April 10th, based, of course, upon the testimony of the witnesses of the defendant itself and certain inherent probabilities in the case. But for present purposes we are content, as far as our case is concerned, severed from the separate and affirmative defense, to stand upon the admitted or stipulated facts and the [328] uncontradicted facts in the record.

Mr. Cooper: May it please the court, I am perfectly happy and prepared to argue the matter at this time, but I think—and, of course, I realize that it is addressed to the sound discretion of the court—that there should be a fair opening.

The Court: Let me interrupt to make this observation: Under any hypothesis, you would have the closing argument, in the light of what has just been stated.

Mr. Cooper: That would be satisfactory, then, may it please the court.

The Court: So that I think you might now proceed.

Mr. Roth: I omitted, in my resume of what were the uncontradicted facts, to also state that Oscar Cummins, in addition, testified that he had never received this wire of April 10, 1943, or been informed about it. [329]

(Oral argument by Mr. Cooper, in the course of which the following proceedings took place):

Mr. Cooper: I must take the position, first, that if your Honor finds as a fact—and I recognize that your Honor can find the other way if your Honor believes Oscar Cummins—that the telegram of April 10th was in fact served—and I am assuming that your Honor concludes that the telegram was served—I realize that this point is made in the brief, but, with your Honor's permission, I should like to refer to it again.

The Court: Let me interrupt to see if I grasp fully the import of the statement just made. Are we agreed that the evidence, so far as the Western Union Telegraph Company is concerned, is to the effect that the telegram of April 10, 1943, was delivered orally over the telephone?

Mr. Cooper: I make no contention, if your Honor please, that the evidence shows that Western Union says that it was delivered personally to Oscar Cummins or Robert Cummings; I make no such contention. It is my contention that the testimony offered by Lester Roth on behalf of the plaintiff with respect to what actually happened does not destroy the presumption.

The Court: Perhaps I didn't make myself clear. All I want to make certain is whether it is your position that the evidence is to the effect that the telegram was delivered orally over the telephone by Western Union. [330]

Mr. Cooper: The evidence is to this effect, that Western Union orally phoned the telegram to Mrs. Oscar Cummins; and, secondly, that they orally telephoned the message to his sister-in-law; and, thirdly, that they tried to deliver it to Robert Cummings, and he was reported to be out of the city. That is as far as the evidence shows. But, may it please the court, it is my position that that fact still does not destroy the presumption. In other words, the presumption is that if the telegram is in fact delivered to the Western Union, that it goes all the way through and gets to the person to whom it is addressed. May I read that, or does your Honor quarrel with that statement?

The Court: No, I am not quarrelling on the subject matter of the legal principles. I am trying to find out what your position is as to this probitive fact. It isn't yet clear to me as to what your position is. Having in mind this presumption, is it your contention that the evidence satisfactorily establishes this probitive fact, namely, that the telegram of April 10, 1943, was delivered over the telephone to Mrs. Oscar Cummins some time on Sunday, April 11, 1943? Do you go that far?

Mr. Cooper: There isn't any question about it, if your Honor please. That is what the testimony offered by the plaintiff shows, that it was phoned to Mrs. Oscar Cummins.

The Court: On April 11th?

Mr. Cooper: On April 11th, or whatever date it was. I [331] think it was the 11th, if your Honor please.

The Court: And as to the delivery of the same telegram over the telephone to someone referred to as—

Mr. Cooper: His sister-in-law, if your Honor please.

The Court: The sister-in-law of Oscar Cummins?

Mr. Cooper: Yes, to his sister-in-law.

The Court: Upon what date?

Mr. Cooper: It was phoned to his sister-in-law at 10:50 a. m., 11th, who will relay message to him.

The Court: Will you just pass that up temporarily?

Mr. Cooper: Yes, your Honor.

The Court: Very well.

Mr. Cooper: Now, I don't want to spend too much time on that point if I have made my position clear.

The Court: Yes, it is.

Mr. Cooper: In other words, as it stands at the present moment, it is our view that there is a conflict in the evidence, and your Honor can find either way. I am taking the position that your Honor finds that this telegram was in fact delivered. In that event there isn't any question but that knowledge was brought home to the plaintiff that he was required to report at the studio.

The Court: Right there, let us assume, for the purpose of this discussion, that on April 11th Western Union did deliver the telegram of April 10th over the telephone, both to Mrs. Oscar Cummins and to a sister-in-law of Mr. Oscar [332] Cummins, each of whom promised to relay the message to Mr. Oscar Cummins. Unless the message was received either by Mr. Robert Cummings or by his representative, Mr. Oscar Cummins, in time to enable the plaintiff to report at the studio by April 12th, would you say that the evidence is sufficient to warrant a

finding to the effect that the defendant gave notice to the plaintiff in time to enable him to comply therewith?

Mr. Cooper: Yes, your Honor. I have, I think, an absolute answer to that in paragraph 15 of the contract:

"If the producer elect to mail such notice or to send the same by telegraph or cable, then the date of mailing thereof, or the date of delivery thereof to the telegraph or cable office, as the case may be, shall be the date of the service of such notice."

That is what the parties contracted. On first reading, I thought they said that mere delivery to the telegraph company should be deemed service, although they didn't go that far. That is paragraph 15, and that is set forth in the brief on page 30 of our memorandum of points and authorities, our trial brief.

Mr. Roth: I would like to interrupt at this time to make my position clear on this wire as I intend to argue it. When I read the telegram, I took it for granted—and I think there is enough in the telegram to warrant it—that the sister-in-law of Robert Cummings and Mrs. Oscar Cummins [333] are one and the same person. I realize that the request is somewhat tardy, but I presume the court and counsel want the facts, and it just so happens that Robert Cummings is an only child and has no sister-in-law. There is no sister-in-law of Robert Cummings. He testified directly, under examination by Mr. Cooper, that he never received this wire and was never told about the wire. So far as the wire is concerned, we can supply the information in a moment. But the telegram is definitely subject to this interpretation, that is, that Mrs. Oscar Cummins and the sister-in-law are one and the same person, and they say "We phoned to Mrs. Oscar

Cummins," and they refer to the address of Robert Cummings as 14111 Sherman Way, Van Nuys. That is not the address of Oscar Cummins. I am just calling that to the court's attention at this time.

Mr. Cooper: If the court please, if counsel has some motion to make—

Mr. Roth: I can argue that from the telegram. But I would like the court to give me permission to reopen for the purpose of putting on that one fact. But I think the telegram definitely bears that construction in its present form.

The Court: Evidence to what effect?

Mr. Roth: Evidence to the effect that the only person that Western Union claims they phoned this message to was Mrs. Oscar Cummins, and that when they say sister-in-law and [334] mention Mrs. Oscar Cummins they mean one and the same person, to show that they didn't phone it to two separate people. That is all I say the wire says. That is the only reason Mrs. Oscar Cummins was put on the witness stand. And I figured that it had been sufficiently covered when Oscar Cummins and Robert Cummings both testified that they never saw the wire of April 10th and that it was never transmitted to them in any form.

Mr. Cooper: Well, counsel, you are handling the plaintiff's case—whatever you suggest doing.

Mr. Roth: I think it is a matter that is important to the court.

The Court: Yes, it is.

Mr. Roth: When I read the wire I thought I was justified, in putting in my case, in reaching the conclusion

that it meant one and the same person, because, knowing the facts as I did, I couldn't conceive of it meaning anyone else.

Mr. Cooper: I can tell you that I thought it was his sister-in-law and his wife, because I went to the trouble of looking up those facts last night.

Mr. Roth: They do not name the sister-in-law or give the address where they phoned her. I suggest at this time that Robert Cummings be recalled to testify to the one fact as to whether or not he has a sister-in-law.

Mr. Cooper: I haven't any objection to that.

The Court: Let me ask you this question: Is it your [335] position, Mr. Cooper, that the plaintiff's sister-in-law mentioned in Plaintiff's Exhibit I purports to refer to the sister-in-law of the plaintiff?

Mr. Cooper: I took it to refer to the sister-in-law of Oscar Cummins. It could mean either. Here is what it says: "Your telegram to Robert Cummings care Oscar Cummins, 527 California Bank Building, out of city, address unknown, was phoned to his sister-in-law at 10:50 A. M., 11th, who will relay message to him." It could mean Robert Cummings' sister-in-law or Oscar Cummins' sister-in-law. It is ambiguous, as it is called to my attention.

Mr. Roth: But each one was a separate address. There was one to Robert Cummings at the Van Nuys address, and one to Oscar Cummins, at the California Bank Building, addressed to Beverly Hills, and there was one to Oscar Cummins at an address on Sunset Boulevard, so those were the only three places that could have been phoned. What I intended to argue from this wire in its present form was that, in view of Mrs. Cummins' testi-

mony, the best construction that could be given to it was that someone in the house, in Mrs. Cummins' absence, probably told the Western Union that they would advise Mrs. Cummins when she returned home.

The Court: In any event, since there is an ambiguity, which is created by the wording which Western Union itself used, I think they should first be called upon to make clear—and I presume they can, from their records—what they [336] mean by the use of the expression “sister-in-law,” because, if it is not referred to one individual, there is no use having evidence with reference to another individual.

Mr. Cooper: As a matter of fact, if your Honor please, I had the representative of the Western Union get the girl who actually phoned the message, but I didn't feel that it was necessary, in view of the fact that counsel didn't cross examine the gentleman from Western Union when he was here.

Mr. Roth: I should have thought, Mr. Cooper, that after the evidence in rebuttal here from Oscar Cummins and then Mrs. Oscar Cummins and Robert Cummings, that it might have been necessary for you to call her.

Mr. Cooper: Not in view of the fact that you referred to, that is, that this was phoned to Mrs. Oscar Cummins. I haven't talked to her.

The Court: Well, let us see if we can make some progress here. In the first place, you might, after conference with plaintiff's counsel, determine whether you are prepared to stipulate that, if plaintiff was recalled to the stand, he would testify that he has no sister-in-law.

Mr. Cooper: If he says that is the fact, I will stipulate that he will so testify.

Mr. Roth: Is that true? Do you have any sisters or brothers?

The Plaintiff: No.

Mr. Roth: Does your wife have a sister? [337]

The Plaintiff: I have no wife.

Mr. Roth: You did have a wife?

The Plaintiff: I did have a wife, but she was an only child.

Mr. Cooper: I will offer to stipulate that he will so testify. I mean that I will accept that stipulation. I would like to call Oscar Cummins about this point.

Mr. Roth: He already testified on this point.

Mr. Cooper: About whether he has a sister-in-law. In other words, it is a fact that Oscar Cummins does have a sister-in-law; is that right?

Mr. Roth: That is right.

Mr. Cooper: Then do you offer that in the form of a stipulation?

Mr. Roth: No, not unless you will offer to stipulate that she didn't receive the phone call.

Mr. Cooper: No; that I wouldn't stipulate to. The only thing is, I would like to call Oscar Cummins for just that point.

The Court: Yes. The ruling is that, by virtue of the stipulation just made, the record now discloses that the plaintiff is deemed to have testified that he has no sister-in-law and did not have any sister-in-law in the month of April, 1943.

Mr. Cooper: That is fair enough. [338]

OSCAR CUMMINS,

a witness heretofore duly sworn on behalf of plaintiff,
upon being recalled as a witness in behalf of defendants,
testified as follows:

Direct Examination.

Q. By Mr. Cooper: Do you have a sister-in-law?

A. Yes.

Q. More than one?

A. One in California and one in Detroit.

Q. One in Los Angeles? A. Yes.

Q. In Beverly Hills? A. In Los Angeles.

Mr. Cooper: That is all.

The Court: May I ask, on April 10th and 11th of 1943, referring now to the sister-in-law residing in Los Angeles, where did she reside?

A. 5000 Finley Avenue.

The Court: Subject, of course, to a direct check by counsel, in the month of April, 1943, did your sister-in-law residing at the address just stated, have either her name or her husband's name listed in the Los Angeles Telephone Directory?

A. I think it is an unlisted telephone.

The Court: When you speak of the sister-in-law residing in Los Angeles, are you referring to the wife of your brother [339] Joe? A. Yes, sir.

The Court: I have no other questions.

(Testimony of Oscar Cummins)

Cross-Examination.

Q. By Mr. Roth: Did Mrs. Joseph Cummins, as far as you know, live in Los Angeles at the address you gave?

A. Yes.

Q. Did she, in the month of April, at any time during the month of April, 1943, advise you that she had received a message from the Western Union Telegraph Company for you or for Robert Cummings?

A. No.

Mr. Roth: That is all.

Mr. Cooper: No further questions.

Mr. Roth: Mr. Joseph Cummins can testify, unless you want to stipulate to it, that his name was not in the telephone book, and that he had an unlisted number.

Mr. Cooper: If you say that is a fact, I will stipulate that he will so testify.

Mr. Roth: That is a fact.

Mr. Cooper: I accept the stipulation that he would so testify.

The Court: Then that stipulation can be deemed to be a part of the record.

(Further argument by Mr. Cooper.) [340]

(Argument by Mr. Roth.)

The Court: We will continue this matter to Monday at 2:00 p. m.

(Whereupon an adjournment was taken until 2:00 o'clock p. m., Monday, January 10, 1944, the time later being changed to 10:00 o'clock a. m. of the same day.)

[341]

Los Angeles, California, Monday, January 10, 1944;
10 A. M.

(Parties present as before.)

The Court: Now are you ready to proceed?

Mr. Cooper: Yes, your Honor. Pursuant to your Honor's suggestion, I have here this morning Mr. Meaney, from the Western Union Telegraph Company, with all of those records in connection with the sending and phoning of the message in question. In addition thereto, we have a gentleman by the name of G. B. James, an employee of Western Union, who, I am informed, made one of the phone calls, and a young lady by the name of Bernice Yorton, who phoned in one or two of the calls in question. Does the court desire to make his own inquiries, or does the court desire that I proceed?

The Court: My present view is that I would like to see the original records themselves; and, after scanning the same, determine whether it will be necessary to interrogate anyone.

Mr. Cooper: Very well. But I have them here, out of an abundance of caution, if your Honor please.

The Court: Yes.

Mr. Cooper: Mr. Meaney, will you please come forwards? [342]

J. E. MEANEY,

a witness heretofore duly sworn on behalf of defendant,
upon being recalled, testified as follows:

The Court: You have already been sworn in this case. I understand you have produced the records of the Western Union Telegraph Company, taken from the Los Angeles office? A. I have.

The Court: Records which relate to what your company did with reference to telephoning the telegram bearing date April 10, 1943, from Universal Pictures Company, Inc. to Robert Cummings? A. I have.

The Court: Now, would you let me see them, and perhaps we may need a particular paper only, without disclosing its contents, merely describing the nature of the records as they pertain to the office of the Western Union Telegraph Company.

Mr. Roth: And might I also request that, after the court has scrutinized the data, I might also look at it.

The Court: It might be preferable if counsel will look at it first. That may save me a little labor.

Mr. Roth: Just as your Honor desires.

The Court: Suppose counsel step alongside the witness bench and peruse the record.

Cross-Examination.

Q. By Mr. Roth: You have handed me, Mr. Meaney, three papers, which purport to be original wires from Universal [343] Pictures Company, Inc., by Edward Muhl, Assitant Secretary, one addressed to Robert Cummings, care Oscar Cummins, 8511 Sunset Boulevard; another addressed to Robert Cummings, by the same corporation, signed by the same assistant secretary, the address being

(Testimony of J. E. Meaney)

14111 Sherman Way, Van Nuys, California. Is that correct?

A. Well, these are not the originals. The originals were submitted to the court last week. These are delivered copies. The original telegrams I submitted last week.

Q. When you speak of delivered copies, you don't mean physically delivered copies, do you?

A. No, not in this case.

Q. And the third one is signed the same way, and is addressed to Robert Cummings, care Oscar Cummins, 527 California Bank Building?

A. Yes.

Q. All of the wires which you have shown to me have at the top the figures—the first one has “S 114 90 4.” Does that number have any significance?

A. Yes. That is the wire number of the telegram. The “90” means the number of words, and the “4” the extra words, on the check.

Q. And “BV” is what?

A. “BV” is the office call of the Western Union office at Beverly Hills, California. The office has a distinctive office call. “BV” is Beverly Hills. [344]

Q. And then the words “Beverly Hills, Calif” and then the—

A. That is the date. And “617P” is the filing time.

Q. This means that it was filed at your office at 6:17 p. m.?

A. Yes.

Q. And the second wire has the same filing time?

A. “6:07 p. m.”

Q. And the words—the “10” is what?

A. The date, April 10th.

Q. And the third one?

A. That is 6:11 p. m., on the same date.

(Testimony of J. E. Meaney)

Q. Now, from those three documents which I have shown you, and from the words and figures which have been read, and which you have interpreted, can you tell whether those documents were physically delivered at the Beverly Hills office, or whether or not they were transmitted by telephone to the Beverly Hills office, or by teletype service?

A. They were physically delivered to the Beverly Hills office.

Q. What is there on the documents to show that?

A. As I say, the originals are already in. These are the wire copies.

Q. What is there on the originals—

Mr. Cooper: We have now before us Defendant's Exhibit B.

Mr. Roth: That is correct. [345]

Q. What is there on the originals to indicate that they were physically delivered?

A. That is a typewritten copy, and if that was taken over the printer from Universal, it would be a different appearing copy of the message. This is typewritten, where ours would be similar to this, a taped copy or a teletype copy.

Q. When you speak of "printer" you mean teletype?

A. That is right.

Q. Is there anything else which indicates to you, from the original, that is, Defendant's Exhibit B, that it was physically delivered?

A. Well, I would say, without any question, from my experience in handling telegrams, that it was physically delivered to the Beverly Hills office.

(Testimony of J. E. Meaney)

Q. Do you have any other reason for saying that other than the fact that Defendant's Exhibit B shows that they were typed, and not taped in?

A. Yes. They are absolutely not taped in.

Q. Do you have any other reason for saying that they were physically delivered other than that reason?

A. Well, they were found in our files at the time the subpoena was served on us, and if they were teletyped in we wouldn't have this copy in our file; we would have a taped copy.

The Court: When you say "this copy," you mean Defendant's [346] Exhibit B? A. Yes.

Q. By Mr. Roth: Defendant's Exhibit B?

A. Yes.

Mr. Roth: We have examined these three wires which have been identified by the witness, your Honor, and I will pass them up to you, while we look at some other data.

The Court: Which documents were you examining, Mr. Meaney, when you determined the hour, or the hour and minute when the telegrams were physically left in the Beverly Hills office?

A. The ones I just testified about as to the filing time, was on the copies here, the taped copies.

Q. By Mr. Roth: The copies other than Defendant's Exhibit B?

A. That is right. Right after the date you will find the filing time, after the "10."

Mr. Roth: May I suggest that the examination of the balance of the data be off the record, because it is in the nature, I think, of a preliminary examination, to determine whether or not the court is going to see this, and it is for

(Testimony of J. E. Meaney)

the purpose of giving counsel an opportunity to see what is in this data. I haven't the slightest idea.

The Court: Is that agreeable to both sides?

Mr. Cooper: It is perfectly agreeable, your Honor.

The Court: Very well. The part that is now inquired into need not be taken down in shorthand, Mr. Reporter.
[347]

(Off the record examination by Mr. Roth.)

Mr. Roth: I have another suggestion. We are going over this informally, and if the court will instruct the reporter to take it down we may be willing to stipulate, after we get through, that it may be considered part of the record.

The Court: Suppose you try and epitomize what has been said thus far.

Mr. Roth: I will try, and then we may not have to go over it.

Q. By Mr. Roth: Mr. Meaney. I understand that in answer to my questions you have stated thus far that this wire, which I will identify as having been sent by Universal Pictures Company, Inc., Edward Muhl, secretary, to Robert Cummings, at 14111 Sherman Way, Van Nuys, California, and which bears in the upper lefthand corner the letter and figures "S 114 90," has at the bottom thereof, in pencil writing, these words or letters and figures: "BA." A. "858 A."

Q. And under "DA" we have "858 A"?

A. That is right.

Q. And to the right we have the letters and figures "SU 22636," and opposite that, to the right thereof, "Adv"? A. "Adse."

Q. "Secy"? A. Yes.

(Testimony of J. E. Meaney)

Q. And to the right of that the figures "11"; is that [348] right?

A. No. That "11" should come after the—

Q. But it doesn't. I am placing it where it is on the telegram. A. Yes.

Q. The figures "11" come after that? A. Yes.

Q. In other words, it is "11th"? A. Yes.

Q. Under the number "SU 22636" there is the capital letter "B"? A. That is right.

Q. And also under the number we have the figures "10" and the letter "A" after that? A. Yes.

Q. And to the right of that what are those letters?

A. "Dlv," delivered.

Mr. Cooper: The "11" is more or less to the right of both of those matters, that is, to the right of "SU 22636," and "Adse Secy," and "B 10 A."

The Witness: "Dlv."

Q. By Mr. Roth: Does that mean that those words and figures and letters mean that the man "B" phoned that telephone number and delivered the message to Robert Cummings' secretary. A. That is right. [349]

The Court: On April 11, 1943?

A. On April 11, 1943.

The Court: At what hour? A. At 10 a. m.

Q. By Mr. Roth: Under the handwritten letters and figures which I have read there is also a name, "Oscar Cummins," written in hand, and under that "Br 04065." Does that have any significance?

A. I know that that is in a different handwriting, by probably another girl, and they secured some information some place that Oscar Cummins, that they may be able to phone this to Oscar Cummins at Bradshaw 04065.

(Testimony of J. E. Meaney)

Q. Can you identify either handwriting, the handwriting I read first, or the one that wrote "Oscar Cummins"?

A. So far I can't. I don't know this gentleman's handwriting, other than to know that he is operator James at our Van Nuys office. I would not be able to say that is his handwriting, because I don't know.

Q. You couldn't say that either are in the handwriting of operator James? A. No.

Q. Can you tell from the handwriting which has been read to you whether operator James actually called Robert Cummings' secretary?

A. It is hearsay, which is as he told me after talking to him about this case. [350]

Mr. Cooper: Operator James is in the courtroom.

The Witness: Yes.

Q. By Mr. Roth: In the upper righthand corner of this same wire which I have, I think we have in handwriting "fone Cr 68798," and under that "607 N. Elm Dr., Beverly Hills"? A. That is right.

Q. Do you know whose handwriting that is in?

A. No, I couldn't say.

Q. What does that mean on the wire?

A. Well, you want my theory on it?

Q. Did it have a meaning?

A. It certainly did. This 607 North Elm Drive would indicate that they had some information that night that this party could be found at phone Crestview 68798, and they forwarded by wire this message; they resent this message back, to be tried at that phone number and that address.

(Testimony of J. E. Meaney)

Q. When you say "they," you mean the Van Nuys office sent it back to the Beverly Hills office to be phoned to the Elm Drive address?

A. Yes. But the message still was in the Van Nuys office, to be tried for subsequent delivery.

Q. Now, as part of the file on this wire, which has already been identified, you have another—it is not a wire, but it may be an interoffice communication.

A. It is a service message. [351]

Q. That is dated April 11th, then AM 8:12?

A. Yes.

Mr. Cooper: That looks like a stamp.

A. That is right. That is an electric stamp.

Q. By Mr. Roth: That reads: "Relay Robert Cummings Phone Crestview 67898 607 North Elm Beverly Hills Unkn." That means unknown?

A. That is right.

Q. And it is also signed "Dly Los A"?

A. That is delivery department, Los Angeles.

Q. They wired back to Van Nuys that the addressee could not be found at North Elm Drive?

A. That is right.

Q. And at the bottom of that there is this notation: "10 Relay Robt Cummings try Phone Br 04065 Care Oscar Cummings DFS Direct if DLD Van Nuys Calif Apr 10." A. April 11th.

Q. What is the other?

Mr. Cooper: The "10" is marked out.

A. That is one of our errors.

Q. I hope you don't include me in that.

A. I hope not.

(Testimony of J. E. Meaney)

Q. What does that mean?

A. This means that this was prepared at 10:15 on the morning of April 11th, that is, this latter one you referred to, by a different clerk, AEW. This notation here, this [352] "Oscar Cummins Bradshaw 04065," that this employee received information that—

Q. That he might reach Robert Cummings there?

A. Yes.

Q. So they tried that Bradshaw number?

A. That is right.

Q. That number is "Br." Could it have been "Brighton" instead of "Bradshaw"? A. No.

Q. What would you put down for "Brighton," instead of "Br."?

A. I think they would write out "Brighton," because I don't know of any exchange—if there are two, we always write the second one.

Q. For your information, Mr. Meaney, there is an exchange that is designated "Brighton."

A. We would write that out.

Q. Why do you say you would write out "Brighton"? Why wouldn't you be writing out "Bradshaw"?

A. When we telephone messages to a Sycamore number, we use "Sy." but if it is "Sylvan," it is written "Sylvan."

Q. Also attached as part of the file I have identified, you have what apparently is another inter-office communication. Am I right? At least, I am taking it from the papers you have given me.

A. That is what they are, you bet. [353]

Q. This inter-office communication also has the stamped date April 11 AM 10:34. A. Yes.

(Testimony of J. E. Meaney)

Q. And it says: "617 10 Robert Cummings SGD Univ Pictures CO OC Ads Unkn Van Nuys Calif." Will you decipher those hieroglyphics?

A. That means that Robert Cummings was out of the city. "OC" means "out of city," and "Ads Unkn" means "address unknown."

Q. Now, I have noticed that this was filed at 10:34 A. M. Is that right? A. Yes.

Q. That is shown on the wire itself.

A. This wasn't filed at 10:34. That is when it was received at the main office.

Q. That is what I meant to say.

A. That is right.

Q. How do you reconcile that inter-office communication which has just been read with the message in handwriting at the bottom of the original wire, which says it was delivered to Oscar Cummins' secretary at 10:00 o'clock A. M.?

A. I would have to confess some delay in our office for that. We have a lot of new employees. This was phoned by a different employee, who didn't follow the job through by sending a Dfs on it, if it was phoned or otherwise. This service message wouldn't have been sent if there had been [354] coordination between the service clerk and the operator; that wasn't present.

Q. Wouldn't that indicate also that the service clerk phoned Robert Cummings at the Van Nuys address, and was told that he was out of the city? A. No.

(Testimony of J. E. Meaney)

Q. Would it indicate that the service clerk made some inquiry and found out that Robert Cummings was out of the city?

A. Well, they did. He was basing this on something that he had known, but in the interim—

Q. It comes after this message is supposed to have been phoned to Robert Cummings' secretary. How do you explain that?

A. It is quite possibly for the reason, as I have explained, that there was a lack of coordination there, the message being phoned, and still we serviced at that time.

Q. At the bottom of this inter-office communication, which shows Robert Cummings was out of the city, there are the letters "Su" and the figures "22171"—Sunset?

A. Yes. Well, "22171" or "22131." That would be a guess on that last.

Q. Yes; it could be a "3" instead of a "7."

A. You know when the paper gets shifted.

Q. When no one is holding it and you are writing, it slips? [355] A. Yes.

Q. Does that telephone number have any significance?

A. Well, not to me, unless just some idea where they can deliver the telegram. Just as an explanation, when we have telegrams like this our employees are urged to use great care, by indicating with two stars on it, because we know the messages are of very great importance, and they use every effort to deliver them, and get every little clue.

Q. Could this mean that the service clerk, whoever it was who sent this message, that that service clerk telephoned that number and got the information which is in the wire? A. Well, it could mean—

(Testimony of J. E. Meaney)

Q. Could it mean that?

A. Well, I wouldn't even—it is a number, and that is all it means. I don't know what the person was thinking of.

Q. Do you know what they were thinking of when they wrote the number on the original wire?

A. Yes, because that is our regular, general routine.

Q. We will proceed with the next document, which is part of this file. That is also an inter-office communication?

A. I think you will find this is a carbon copy.

Q. It is not a carbon copy.

A. That is what we call a runner. That is an office record, with a description of the telegram, and is put in the file, and later, if Mr. Cummings came home and someone said, [356] "Western Union is looking for you; they have a telegram for you," they call us and we look through our undelivered messages and dig this out.

Q. Well, that is on one side of a printed form, which has at the top thereof the Western Union Telegraph Company memoranda of the handling of undelivered messages? A. That is right.

Q. This memorandum of undelivered message, is it left at the address of the addressee? A. No.

Q. That is kept in the files of the Western Union?

A. That is right.

Q. It has on the printed side thereof, after the printed word "Addressee," the name "Robert Cummings," and the message number, after the printed word "message number," "S114"? A. That is right.

Q. And after the printed word "Dated," it has "4/10"? A. That is right.

(Testimony of J. E. Meaney)

Q. In the line which has this printing, "Notify originating office by service message," it has the initials "EW." What does all that mean?

A. This "EW" is the clerk in the Van Nuys office, and she wrote in there indicating that she sent a service message notifying "undelivered."

Q. She sent a service message to your office?

A. To the main office. [357]

Q. Advising them of non-delivery?

A. She sent this to the Beverly Hills—

Q. Advising non-delivery?

A. That is right.

Q. And that all went in on this file?

A. That is right.

Q. And this went in—could you tell at what time?

A. 10:10 a. m.

Q. I call your attention again, Mr. Meaney, to the fact that at the bottom of the original wire which we have identified by the number "S 114 90," the letters and figures in handwriting you say indicate a delivery by telephone at 10:00 o'clock a. m. to the secretary of Robert Cummings?

A. Yes.

Q. How do you reconcile those two?

A. It is probably delay, as I said before, lack of coordination between the service desk and the operating desk. It was reported undelivered ten minutes after it was delivered. That is delivered, based on the information here.

Mr. Roth: Mr. Cooper, may we staple these together?

Mr. Cooper: No objection.

Mr. Roth: And hand them to the court for its scrutiny, and proceed with the others?

(Testimony of J. E. Meaney)

Mr. Cooper: Certainly. I might suggest that Sunset number, we may have a clue to that. That is the Universal number.

The Witness: Sunset 22171: [358]

Mr. Roth: That is the way I read it originally, only Mr. Meaney thought it was a "3."

The Witness: You are right—"22171." That doesn't indicate a thing about it. Someone wrote the number down and filed this record of that date. Your guess would be as good as mine.

Q. Suppose my telephone number were on there, with my name opposite it, would that indicate anything to you?

A. Yes; I would assume that the girl gave you a try and asked you if you knew where Mr. Cummings was.

Q. Wouldn't you assume, with the telephone number of Universal on there, and Universal being the sender of the message, that the service operator at Van Nuys either called Universal for additional information as to the address of Robert Cummings, or told Universal that the message had not been delivered?

A. The reason I can't say that is because, if that was done, the girl should have at least completed the memorandum showing just what disposition was made.

Mr. Cooper: I suggest also that the 11th was Sunday, and maybe they didn't get it.

Q. By Mr. Roth: We will now proceed with the second wire.

A. That apparently went through like we like to see them go through.

Q. I show you now a wire which, in the upper left-hand corner, has the letters "SW201 90," and that is addressed to [359] Robert Cummings care Oscar Cummins, 8511 Sunset Boulevard, Los Angeles, California, and it

(Testimony of J. E. Meaney)

is signed "Universal Pictures Co. Inc., Edward Muhl, Assistant Secretary." At the bottom in what purports to be a stamped box, that is, a box made with a stamp—

A. Rubber stamp, apparently.

Q. You have a telephone number, with the number in handwriting, "Br 04065," and then you have, "Telephoned to sister-in-law." The "Telephoned to" is part of the stamp, and "sister-in-law" is in handwriting. Then what is this? A. "Time delivered."

Q. "10:50 A"? A. That is right.

Q. And then you have the stamp "By"?

A. "Cy." That is the operator.

Q. "To"— A. To be filed, "fld."

Q. This is the one that you say went through promptly, like you like to see them go through; is that right? A. Yes.

Q. Now, where did you get that telephone number, "Brighton" or "Bradshaw," "Br 04065"?

A. Well, the office that delivered it, that it was received by for delivery, looked it up in the phone book, or wherever they have their file, if they have confidential numbers—they have records of prominent people, their [360] particular numbers—I couldn't tell you.

Q. But there is no notation on the wire itself which indicates where that telephone number came from?

A. No. The operator that phoned that is in the courtroom. She could answer that.

Q. What is her name?

A. Yorton, Bernice Yorton.

Q. That indicates to you that this message was phoned to the sister-in-law of whom?

A. I couldn't tell you. All I could say is "sister-in-law."

(Testimony of J. E. Meaney)

Q. It is addressed to Robert Cummings, care Oscar Cummins. Is there anything on there which would indicate whose sister-in-law?

A. It is the addressee's sister-in-law, the person's sister-in-law. The addressee is the party that we are interested in getting the telegram to.

Q. Do you mean by the "addressee," Robert Cummings?

A. Yes, sir.

Mr. Roth: We will pass this one for the time being up to the court for its scrutiny.

Q. Now we come to the third one, and that has in its upper lefthand corner these letters and figures, "SW202 90," and at the bottom also a stamped box, and that has in the stamped box, "Telephone No. Brighton 04065."

A. Is that Brighton? [361]

Q. "Br." I am sorry. I mean "Br."

A. Bradshaw.

Q. I will take your word. It is one or the other. And then it is stamped, and it says, "Telephoned to sister-in-law"?

A. That is right.

Q. And then "Time Delivered 10:50 A"?

A. That is right.

Q. And "By" in stamp, and "Cy" in handwriting, and "fld" in handwriting?

A. Filed.

Q. This last wire is addressed to Robert Cummings, care Oscar Cummins, 527 California Bank Building, and it is the same operator and the same telephone number and the same notation as to sister-in-law. Does that mean that it is a duplication and that wire was phoned once or twice?

A. No; two separate telegrams.

(Testimony of J. E. Meaney)

Mr. Cooper: If your Honor please, may we have the report that went through to Universal? I think that would be part of the same file, would it not?

The Witness: No.

Mr. Roth: At this point, Mr. Cooper, I prefer the witness not to look at it.

Mr. Cooper: That is all right.

Q. By Mr. Roth: Does this mean, Mr. Meaney, that this message was separately phoned? [362]

A. Oh, yes.

Q. By the same operator? A. Yes.

Q. May I call your attention to the second wire, which is the one "SW201 90," and direct your attention to the fact that the telephone number is exactly the same, "Br 04065." The words "Telephoned to sister-in-law" is exactly the same, the time is exactly the same, and the word "By" is followed by "Cy." exactly the same operator? A. Yes.

Q. Would you still say that it was telephoned twice, but to different people?

A. No. I would say they were both telephoned. That happens frequently where we get a bunch of telegrams: we may have one, two or three going to the same party, and our employee would send that message, and every one dropped on the desk the same thing, and she would phone this one and—

Q. Suppose the message were identical except for address?

A. It wouldn't make a bit of difference, because one is addressed to Oscar Cummins at 8511 Sunset—

Q. No, you are wrong. They are both addressed to Robert Cummings, one in care of Oscar Cummins, 8511

(Testimony of J. E. Meaney)

Sunset Boulevard, and the other to Robert Cummings, care Oscar Cummins, 527 California Bank Building.

A. They were addressed in care of Oscar Cummins at a different address than this one; so the operator, knowing [363] there is something in the wind some place—we have these kind of telegrams—and we deliver them as individual telegrams. We couldn't say, "Well, we have delivered one, and we should worry about the second one."

Q. Then what you are testifying to is that each one was separately phoned by the same operator?

A. I would say so.

Q. At least to the same telephone number?

A. Oh, yes.

Q. Now, if they were separately phoned wouldn't the time of phoning be different?

A. Yes, it should be. It is supposed to be, because you couldn't file your telegrams like that at the same minute,—I mean phone them, so there should be two or three minutes one way or the other.

Q. Attached to the third, which has been identified as "SW202 90," you have some memoranda. It is all in type. It is addressed "Universal Pictures Co. Inc., Edward Muhl, assistant secretary," and then it says "WUX LOSA." What does that mean?

A. "WUX" is the symbol for a company that has a direct teleprinter connection with our office.

Q. Does that mean that these duplicate or apparently carbon data were teleprinted into Universal on that day?

A. That is right.

(Testimony of J. E. Meaney)

Q. The date it was teleprinted into Universal, is what, [364] as indicated by this data?

A. From this copy I could not tell you, because the girl who typed this failed to put the date on it.

Q. Let us read what it says: "Your telegram to Robert Cummings (Report Dely) care Oscar Cummins 527 California Bank Bldg was foned to his sisterinlaw at 1050 AM who will relay Msg to him." It is signed "Western Union Tele Co." A. That is right.

Q. But the date of that teletyped message is not on there?

A. This is a carbon copy, and the original would probably have it on there.

Q. That is right. I didn't think the second page was part of the first, but they are apparently one. It goes on to say at the top of this second carbon sheet—These initials in the corner, "SVC," what does that mean?

A. Service. It also has at the top, "Universal Studios WUX LOSA." That means Los Angeles. "LOSA" means Los Angeles.

Q. Do these figures mean anything, "10 611P"?

A. Yes. That is a description of this telegram, the 10th, filed at 6:11 p. m.

Q. "Robert Cummings care Oscar Cummins 527 California Bank Bldg closed till AM 8511 Sunset Blvd closed till AM 14111 Sherman Way Van Nuys out of city address unkn", and then a dash, and "We foned to Mrs. Oscar Cummins who will relay message." And at the bottom you have "Beverly Hills, [365] Calif 11."

A. Yes.

(Testimony of J. E. Meaney)

Q. Where, on any of your other data connected with any of these wires, do you have a report that the message was phoned to Mrs. Oscar Cummins?

A. This message here, this service here, refers to this telegram.

The Court: For the purpose of the record, will counsel indicate to the reporter what the witness is pointing to?

Mr. Roth: Yes. The witness is indicating duplicate teletyped message which I have just read, and which is undated. If it is a duplicate of the original of Plaintiff's Exhibit 1 in evidence, it apparently was sent on April 12th. The witness is referring to that in connection with a wire which is identified in the upper lefthand corner as "SW202 90."

The Court: And the wire referred to is also a part of the files of the Western Union Telegraph Company?

Mr. Roth: That is correct.

The Witness: The same person that prepared this service message to the Universal Studios is the same person that telephoned the message, and she used a different description in servicing Universal Studios by saying that she phoned it to Mrs. Oscar Cummins, where, in the telegram, she said she phoned it to Mr. Cummings' sister-in-law.

Q. By Mr. Roth: Do you assume from that that the person who phoned the message just assumed that Mrs. Oscar Cummins [366] was the sister-in-law of Robert Cummings? A. Sure.

Mr. Cooper: If your Honor please, there will be more proof put on on that subject later.

Mr. Roth: I think we have examined at least the original data of the Western Union Company file on this subject to our satisfaction, and we are prepared to sti-

(Testimony of J. E. Meaney)

pulate that that data, or photostatic copies, in the event the court is willing and counsel wants to substitute photostats thereof, may be substituted for the originals.

Mr. Cooper: The witness' testimony is in. Just let the testimony stand as it is.

Mr. Roth: I am offering that stipulation, that this testimony, plus the data, be part of the record.

Mr. Cooper: I accept the stipulation. I have some further questions to address to the witness, however.

The Court: Just a moment. Are you able to tell us, Mr. Meaney, how you determined that the operator who is designated by the initials "CY" in the wires which are a part of the file which you just brought here, is the same person who sent the teleprint message to Universal, a copy of which was just read?

A. I can in this particular case, your Honor, because this is a carbon copy, and the girls, when they prepare service messages, are always supposed to put their initials on, and those are checked in the lower lefthand corner, and [367] in this case she did put that there. You will notice the "CY" on this, and the "CY" there, and the phone number.

Q. That notation to which you called our attention appears in the lower lefthand corner of the carbon copy of the teleprint message, which purports to refer to all three telegrams?

A. No. This, your Honor, refers to this particular message alone, and I identify that by the date and the filing time immediately prior to the addressee's name. This is our form of identifying a particular telegram.

(Testimony of J. E. Meaney)

The Court: But in the body of the teletype message reference is made to all three telegrams.

A. No. This just refers to this particular one, but it refers to various addresses where they tried to deliver them. There are three addresses in there.

The Court: Very well. Have you some further questions?

Mr. Cooper: Yes, your Honor.

Redirect Examination

Q. By Mr. Cooper: May I have that portion of your records wherein you report delivery to the secretary? That is the first one, that has "S114 90" in the upper left-hand corner. According to the records of your office, notwithstanding the fact that you reported to Universal that you were unable to obtain delivery on this one, your records do show that one of your operators did get delivery by phoning it to Sunset 22636, and delivering the message, S114 90, to the [368] secretary of Robert Cummings? A. Yes.

Q. That was not reported to Universal, however?

A. I couldn't say that, because there is nothing indicating in the file that it was reported.

Q. With respect to the numbers "Brighton" and "Bradshaw," there are occasions when employees of your office do not always follow instructions literally; is that correct? A. Yes, unfortunately.

Q. And it might be "Brighton" or it might be "Bradshaw"? A. That is correct.

Mr. Cooper: That is all.

Mr. Roth: I have no questions.

Mr. Cooper: If your Honor please, I have the other people here. Should I call them at this time, or does your Honor prefer that I wait until 2:00 o'clock? We have them here, and we would like to call them.

The Court: I presume you will be finished with them in a comparatively short time?

Mr. Cooper: Yes, your Honor. Mr. James, please.
[369]

G. B. JAMES,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. G. B. James.

Direct Examination

Q. By Mr. Cooper: Mr. James, you are employed by the Western Union Telegraph Company?

A. Yes, sir.

Q. And have been for approximately how long?

A. At Van Nuys, I have been there four years. I have been with the company off and on for twenty-five.

Q. You were employed on April 10th and 11th of this year? A. Yes.

Q. Where were you working at that time, on those dates, April 10th and 11th?

A. Well, I was working at the Western Union, at Van Nuys.

Q. At Van Nuys? A. Yes.

Q. What were your duties at the Van Nuys office of Western Union Telegraph Company on those days? In what capacity were you employed?

A. Well, I was employed as night manager at present.

(Testimony of G. B. James)

Mr. Roth: Would the court ask the witness to please speak up, so that we can hear him?

The Witness: I act as night manager at the present, and [370] have been since I started, for the last four years.

Q. In other words, on April 10th and 11th, you were the night manager? A. Yes.

Q. I show you a telegram, the one that has "S 114 90" on it, and ask you if your handwriting appears on the telegram at any place? A. Yes, it does.

Q. Where is your handwriting on this telegram?

A. Right here.

Q. You indicated "fone Cr 68798"?

A. Crestview.

Q. And "607 N. Elm Dr., Beverly Hills," is that also in your handwriting? A. Yes, sir.

Q. Does your handwriting appear at any other place on this telegram? A. Right there.

Q. The letter "B," is that your handwriting?

A. Yes, sir.

Q. Is "Da 855A" yours? A. Yes, sir.

Q. Is "Su 22636" your handwriting?

A. Yes, sir.

Q. Is "Adse Secy" your handwriting?

A. Yes. [371]

Q. Do you have an independent recollection or any recollection of what you did when this message came in?

A. Well, I tried to deliver the message. I sent the message out to his residence.

Q. In other words, you actually tried to deliver it physically by messenger? A. Yes, sir.

Q. What happened?

A. He wasn't home, nobody home.

(Testimony of G. B. James)

Q. Then what did you do?

A. Well, I tried to phone it. I endeavored to phone it and deliver the message in every way I could.

Q. Did you phone "Crestview 68798"?

A. Well, I tried that, undoubtedly, and I must have gotten the number. I don't know where that came in, but I tried that, anyway, and it wasn't delivered at that number.

Q. Do you have any recollection of having talked to anybody and having delivered this message to anyone?

A. Yes, sir.

Q. To whom?

A. To the secretary of Robert Cummings.

Q. You phoned what number?

A. Sunset 22636.

Q. And someone answered? A. Yes, sir.

Q. Do you have any recollection of what your conversation [372] was?

A. Yes. I talked to the lady, and I says, "I have a message for Robert Cummings. Who is this speaking now? Is he there?" And the lady answered and said, "I am his secretary, and may I take the message?"

Q. Then what did you do?

A. She says, "Can I take the message," and I says, "Well, can you take a message for him?" And she said, "Yes, I will be glad to take it." And I says, "Do you know where he is or where we can get in touch with him?" And she says, "I will deliver the message to him."

Q. I want you to tell us what you said to her on the telephone. Did you read the message?

A. I phoned the whole message to her.

(Testimony of G. B. James)

Q. State into the record exactly what you said to her.

A. I said to her, "I have a message for Robert Cummings and I would like to deliver it to him. Will you take the message?" And she said, "I will be glad to take the message and deliver it to him."

Q. Tell us what you read to her.

A. The whole message.

Q. I want you to read it.

A. "I have a message for Robert Cummings from Beverly Hills, California: 'You are hereby instructed to report to us at our studio at Universal City, California at the office of Mr. Dan Kelley at ten o'clock Monday morning April 12, [373] 1943 for the rendition of your services under your contract of employment with us dated November 21, 1938 as heretofore amended and extended in connection with the portrayal of a role in our photoplay now entitled *fi red wife* and or the rendition of such other services as we may require under said contract as amended and extended.' Signed 'Universal Pictures Company Inc., Edward Muhl, Assistant Secretary.'"

Q. Do you recall whether she said anything to you after that?

A. I asked her where he was, and she said she didn't know at the present time, but she would deliver the message to him.

Mr. Cooper: That is all. You may cross examine.

The Court: Just a moment, please.

Mr. Cooper: One further question.

Q. Have you talked to me at all before you came into the courtroom?

A. No, sir, I never met you before.

Mr. Cooper: That is all.

(Testimony of G. B. James)

Cross-Examination

Q. By Mr. Roth: Did you talk to Mr. Abbott?

A. No, sir. No one in the office.

Q. Did you talk to me?

A. No, I haven't talked to you.

Q. Mr. James, why do you use the initial "B"?

A. Well, every operator that works at an office is [374] assigned "B" or identifies himself in case of a mistake or something happens to a telegram in a case like this.

Q. I understood you to testify that you were the night operator?

A. Night manager.

Q. You were then and are now?

A. Well, I am now clerk, and, in fact, I am operator, clerk and counter clerk and teletype operator, whatever there may be.

Q. Are there any assistants there in that Van Nuys office?

A. Assistants—well, no, there are no assistants there. There have got a manager and a night manager, and we have girls.

Q. On this day of April 10th, can you tell from the message which you have in front of you, and which is identified by the letter "S" and the figures "114 90," when you received that at the Van Nuys office?

A. That was received at 7:03 p. m.

Q. At the Van Nuys office? A. Yes.

Q. How long had you been on duty?

A. Well, I was on duty—I am on some days from 9:00 or 10:00.

(Testimony of G. B. James)

Q. On that day when you came to the office, what was your shift on that day, that is, on April 10th, 1943? [375]

A. Well, I really don't know. It was either 1:30 to 9:00, or, if it was Sunday, the hours were from 8:00 to 12:00 and 2:00 to 6:00—8:00 in the morning to 2:00 in the afternoon, and then 2:00 to 6:00.

Q. And if it were Saturday—

A. They would be from 1:30 to 10:30.

Q. From 1:30 in the afternoon until 10:30 in the evening? A. Yes.

Mr. Roth: The 10th, I think we can stipulate, was a Saturday.

Mr. Cooper: That is correct.

Mr. Roth: And the 11th was Sunday.

Mr. Cooper: That is correct.

Mr. Roth: And the 12th was Monday.

Mr. Cooper: That is correct.

Q. By Mr. Roth: The date that is on that wire—
you received it on the 10th? A. Yes.

Q. At the Van Nuys office, a little after 7:00 o'clock?

A. Yes.

Q. Did you do anything with it then?

A. Sent it out to his house.

Q. Who did you send it with?

A. This delivery messenger.

Q. Do you know who that was?

A. I don't recall now, we have so many there, and they [376] are quitting all the time.

Q. Did you get a report from the messenger?

A. I got a report from the messenger that he wasn't home.

Q. Did you write that up? Having refreshed your memory by looking at the data in the file on that particular

(Testimony of G. B. James)

telegram, can you tell us when you sent it for physical delivery or by messenger boy, and who the boy was?

A. Well, I couldn't say. I really couldn't recall the messenger boy's name.

Q. Well, tell us when you sent it by physical delivery.

A. It was sent out within an hour from the time it was delivered to me.

Q. Is there anything in the data that you hold in your hand which indicates that that was so?

A. Yes. We try, and if we can't get delivery then by phone, because the telephone is disconnected or we couldn't get him at his home, if that is the case, then we always try to deliver them.

Q. What was the first thing you did? Tell us the first thing you did.

A. You want to know the first thing I did?

Mr. Roth: Just a moment.

The Court: Just a moment.

Q. By Mr. Roth: The first thing you did when that message came in on Saturday night, you phoned and they said the phone was disconnected, is that right? [377]

A. Either disconnected—I wouldn't positively say, but occasionally the report from the messenger was that he was unable to deliver the message.

Q. I am trying to find out what you did before you gave it to the messenger boy.

A. I tried to phone the message, and he either didn't answer or the phone was disconnected.

Q. The phone was disconnected at that time?

A. Yes.

Q. Then you testified on direct, in answer to one of Mr. Cooper's questions, that you made this telephone call

(Testimony of G. B. James)

to the Elm Drive address at Beverly Hills. Did you make that call?

A. Yes, I made that call. That is my writing on there. I made the call.

Q. May I call your attention to this inter-office message, attached to the original wire, which says, "Relay Robert Cummings Phone Crestview 67898 607 North Elm Beverly Hills unkn." Doesn't that indicate to you that you asked Beverly Hills to make the telephone call, and they sent back that message to you, telling you that Robert Cummings was unknown there?

A. That is right.

Q. Then you didn't make the call to the Elm Drive number, did you?

A. Well, anyway, it was phoned; it was relayed to Beverly Hills to be phoned. [378]

Q. But you did not make the call? A. No.

Q. Now, Mr. James, having ascertained that the telephone at Robert Cummings' home was disconnected on Saturday night, why didn't you send the message by messenger on Sunday morning?

A. Sunday morning we got a report that he was out of the city and that he was unknown.

Q. Where do you find that?

A. That was in Beverly Hills. Beg pardon.

Q. That was not your office? A. No.

Q. My question is, the pending question is, having ascertained Saturday night that the phone was disconnected, and your messenger boy having come back unable to make physical delivery of the telegram, why didn't you, on Sunday morning, between the hours of 8:00 and 12:00,

(Testimony of G. B. James)

when you were on duty, send the messenger out to physically deliver the telegram to Robert Cummings' address?

A. Sunday morning we ascertained the telephone number of Sunset 22636, and it was phoned to his secretary.

Q. Well, what telephone number did you call on Saturday night, when you found out that the phone was disconnected?

A. Well, we would have the phone number out there. I don't know what the reason was, whether it had been destroyed or not, but we did have a phone number. [379]

Q. I am just asking. Is this a possible construction, Mr. James, of your notations on the bottom of this wire, that you were advised by the Los Angeles office or the Beverly Hills office that they had phoned the Cummings message to Cummings' sister-in-law?

A. Well, this writing at the bottom here was ascertained by one of our clerks out there. I didn't get that Bradshaw number. She got that.

Q. You mean the "Br" number?

A. Yes, sir.

Q. Doesn't the fact that this "Br" number is on the bottom of this wire, plus the fact that the same "Br" number is on the other two wires, indicate that the message was actually phoned by the Beverly Hills and/or the Los Angeles office, and your office was given the information?

A. Yes; we got the information. I don't know where it was ascertained, but we did get the information.

Q. Let me ask you another question: Isn't it true that those numbers down there on the face of that wire, that the name "Oscar Cummins" is not in your handwriting?

A. No, sir.

(Testimony of G. B. James)

Q. And the number, "Br 04065," is not in your handwriting, is it? A. No.

Q. And the figure "11th," is that your handwriting?

A. Yes, sir. [380]

Q. Isn't the fact that that "Br" is there, and that it has the name "Oscar Cummins" and has a number there, under that message, doesn't it have some significance to you? In other words, why is it on there?

A. Well, that was put on there, attempting to phone to Bradshaw 04065.

Mr. Roth: I have no further questions.

Redirect Examination

Q. By Mr. Cooper: One more question, and I want you to answer this honestly, to the best of your recollection.

Mr. Roth: We assume that he will answer honestly.

Q. By Mr. Cooper: Do you have an independent recollection that you made this phone call to the secretary, or are you just guessing?

A. No. I have a recollection of phoning it to her, to a lady who posed as his secretary.

Mr. Cooper: That is all.

Recross-Examination

Q. By Mr. Roth: Suppose I told you, Mr. James, that Robert Cummings had no secretary, would your testimony still be the same? Would you be as sure of your recollection as you apparently are?

A. I am sure. You say, if he didn't have a secretary?

Mr. Roth: Would you read the question, please?

(Question read by the reporter.)

A. I am sure of my recollection. [381]

(Testimony of G. B. James)

Q. Are you sure that the person at the other end of the line said that she was his secretary?

A. Yes, I am positive she said, "I am Robert Cummings' secretary, and I will be glad to take the message."

Q. When you started to read the message to the person at the other end of the line did she ask you to hold up reading it, so that she could get her book and take it down?

A. She did say that she would write it down, that she would write the message down.

Q. Did she ask you to read it slowly, so that she could write it down?

A. I read the telegram very slowly—not very slowly, but quite—I read the telegram—I didn't read it so awful slow, but she was taking it down. She took it down.

Q. She didn't ask you to hold the line while she got a book?

A. She said she would take it down.

Q. My question was, did she ask you to hold the line a minute so that she could go and get a book and pencil?

A. She didn't say that. She said, "I will take the message."

Q. Did she say, "I will take the message"?

A. She said, "I will take the message down."

Q. And then she ended up by saying that she would deliver it?

A. She would deliver it to Mr. Cummings. And I asked [382] her where Mr. Cummings was, so that we might deliver it to him, but she said she didn't know, and she would deliver the message.

Mr. Roth: That is all.

Mr. Cooper: If your Honor please, I guess we had better save the other until 2:00 o'clock. I will be very

(Testimony of G. B. James)

happy to proceed in any way your Honor desires.

The Court: Do you anticipate that the testimony of that witness will be as long as this witness?

Mr. Cooper: I am afraid it will, if your Honor please.

The Court: Very well. You may step down, Mr. James. I am disturbed about the amount of time that will be available this afternoon, and, while I am satisfied that we shall likely have the time to hear the other witnesses, I have grave doubt about giving you time for the additional oral argument. Did you say you have a trial scheduled to begin in the morning?

Mr. Cooper: Yes, your Honor, in Judge Harrison's court, at 10:00 o'clock, a jury trial. I am sure he would be very unhappy if we were not to proceed. I might try to make arrangements to put it over until 2:00 o'clock, in view of our present situation.

Mr. Roth: I think if that could be done without imposing upon Judge Harrison it would be helpful all around, because we are prepared to finish the oral argument, and we won't be unduly long, and the matter can be then concluded. I would [383] want to make this request of the court, in view of the evidence put on in respect of this telegram. Robert Cummings is up at Oxnard today, but we can get him down here, and I would like to put him back on the stand, at least to testify as to that house in Van Nuys. It is general knowledge that the house was closed during all that period of time, and I would like to put that evidence on. It shouldn't take long, and I can have him here the first thing in the morning.

Mr. Cooper: I might state the further nature of our testimony, so that counsel might be prepared to anticipate it.

(Testimony of G. B. James)

Mr. Roth: I may even stipulate it.

Mr. Cooper: You may. I intend to put on several witnesses. I intend to call Oscar Cummins first, to ask him if it wasn't a fact that he had represented himself as a half brother of Robert Cummings, and I will have several witnesses to whom he made that statement.

Mr. Roth: I may stipulate to that. I will tell you at 2:00 o'clock.

Mr. Cooper: All right.

The Court: I am not sure that we have any evidence as to what was the nature of the establishment at 8511 Sunset Boulevard.

Mr. Roth: That is an office building, that has been closed, I think, for several months, thirteen months. It was a place at which Oscar Cummins had an address some years ago.

Mr. Cooper: If you offer to stipulate to the other, I [384] might—

Mr. Roth: I don't know all the facts, but I will talk it over with you when we adjourn and tell you what the facts are, and if you want to investigate them, all right.

The Court: We will resume at 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock p. m., of the same day, Monday, January 10, 1944.) [385]

Los Angeles, California, Monday, January 10, 1944;
2:00 P. M.

(Parties present as before.)

The Court: I was going to suggest to counsel in the case on trial that we have about an hour available this afternoon, and that we can convene in the morning in advance of the regular hour. But it will be necessary for your case to begin at 11:00 o'clock, Mr. Cooper, and I am suggesting, therefore, that counsel keep these facts in mind. Do you want to convene at 9:00 o'clock in the morning?

Mr. Roth: That will be perfectly satisfactory.

Mr. Cooper: Whatever is convenient to counsel and the court. Bernice Yorton, please come forward.

BERNICE YORTON,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Bernice Yorton.

Direct Examination

Q. By Mr. Cooper: Miss Yorton, in April of this year were you employed by Western Union Telegraph Company? A. I was.

Q. Are you employed by them now?

A. No, I am not.

Q. When did you leave the employ of Western Union [386] Telegraph Company, approximately?

A. About August 21st.

Q. In April of 1943 at what branch or office of Western Union were you employed?

A. At Beverly Hills.

(Testimony of Bernice Yorton)

Q. In what capacity?

A. Teletype operator and clerk.

Q. Do you recall whether or not you were actually working on Saturday afternoon, the 10th of April?

A. Yes, I was.

Q. Now, I show you three telegrams, being Defendant's Exhibit B in evidence, and ask you if you recognize those telegrams as telegrams that you have seen before?

A. Well, I never have seen these, because I see this is stamped in at 6:17, and I was not at work then.

Q. Did you work the next day, Sunday, the 11th?

A. Yes, I did.

Q. Did you do something with reference to the telegrams I have just shown you?

A. Well, I tried to get in touch with the addressee.

Q. I show you three other telegrams, being the same messages as the telegrams in Defendant's Exhibit B, and ask you to examine those three and tell me which one of these, or, if more than one, which ones you tried to deliver, and how?

A. These two telegrams. [387]

Q. The two you are referring to are the one with the number "SW201 90" in the upper lefthand corner, Robert Cummings, care Oscar Cummins, 8511 Sunset Boulevard, and the second "SW202 90" in the upper lefthand corner, addressed to Robert Cummings, care Oscar Cummins, 527 California Bank Building; is that correct?

A. Yes.

Q. In what form did the message come to you?

A. Well, the message came to me just the way it is here.

Q. Did you have these two physical documents before you?

A. Yes, I did.

(Testimony of Bernice Yorton)

Q. Is there something on these documents that you could identify?

A. Well, my initials down here in the corner.

Q. The "Cy"? A. Yes.

Q. Is the "Br 04065" in your handwriting?

A. Yes, sir.

Q. Is the "Sister-in-law" your handwriting?

A. Yes, sir.

Q. Is the "10:50 A" your handwriting?

A. Yes, sir.

Q. And "fld," is that your handwriting?

A. Yes.

Q. And likewise the notations on the other telegram?
I think they are identical. [388]

A. Yes, sir.

Q. Tell us just exactly what you did when you were given these two messages to deliver.

A. Well, I believe service called the studio, Universal, to try and get Robert Cummings' phone number, and they gave me a phone number out in the valley, and I believe I talked to his mother.

Q. To whose mother?

A. To Robert Cummings' mother.

Q. You phoned someone out in the valley and talked to someone you believed was Robert Cummings' mother?

A. Yes.

Q. Did you deliver the message to her?

A. I asked her if he was there, and she said no, and she gave me this Brighton phone number, saying it was Oscar Cummins' number, who was Robert Cummings' brother, and he possibly would know where Robert Cummings was. I called there and was—

(Testimony of Bernice Yorton)

Q. Where?

A. The Brighton number, the one on there.

Q. Brighton 04065?

A. Yes. And Oscar Cummins wasn't there.

Q. Pardon me. When you called "Br 04065," did someone answer the phone?

A. Yes; a woman answered.

Q. What did you say to her and what did she say to you? [389]

A. I told her I had a telegram for Robert Cummings, in care of Oscar Cummins, and she said neither one of them was there, but she was Oscar Cummins' wife and she would take the messages. Both telegrams were exactly the same and I only read one of them to her. I told her we had two and I only read one. And she said she would give him the message, and that was all.

Q. What did you mean by "sister-in-law"?

A. She said she was Oscar Cummins' wife, and I believed Oscar Cummins was Robert Cummings' brother, so that made her the sister-in-law.

Mr. Cooper: You may cross examine.

Cross-Examination

Q. By Mr. Roth: When did you get there on Sunday morning? A. 7:00 o'clock in the morning.

Q. When were the telegrams handed to you?

A. I believe they were already there, because they came in the Saturday night before.

Q. Did you pick them up?

A. I don't exactly remember.

Q. Did anyone give them to you?

A. I couldn't tell you. There were only two of us in the office, and I don't know who saw it first.

(Testimony of Bernice Yorton)

Q. Do you know whether anyone called before you called?

A. No, I don't know. There weren't any notations on the telegram on that. [390]

Q. Do you remember what number you called in the valley?

A. It was a Sunset number, but I don't know what it was. I didn't write it down.

Q. Was there a phone call made to that Brighton number at 8:55 that Sunday morning?

A. I don't know.

Q. If there was one made, you didn't make it?

A. Well, I might have made it and gotten no answer. I don't remember. I didn't note it on the telegram, if I did.

Q. What time did you call the valley and talk to the mother or the woman who said she was the mother of Mr. Robert Cummings?

A. Sometime from 7:00 to 10:00. I don't know when.

Q. Can you fix the time with respect to the time you actually called the Brighton number?

A. I would say somewhere around 10:00 o'clock.

Q. The notation in your handwriting on the telegram shows that you called the Brighton number at 10:50.

A. Yes.

Q. So you spoke to the woman who said she was Mrs. Robert Cummings, Robert Cummings' mother, sometime around 10:00 o'clock that same morning?

A. Between 10:00 and 10:50 somewhere.

Q. When did you call Universal?

A. I called Universal between 10:00 and 10.50.

(Testimony of Bernice Yorton)

Q. Who did you talk to? [391]

A. I don't know.

Q. Who did you ask for?

A. I just simply stated that I had these telegrams for Robert Cummings, and that I couldn't find the phone number, and could they give me some idea where to reach him, because the California Bank address was closed and I couldn't get anybody there.

Q. Did you also try the Sunset Boulevard address?

A. I didn't, no. Both telegrams came in at the same time, and they were both the same, and I tried to get someone.

Q. Did you know that one of the telegrams was at the Van Nuys office? A. No, I didn't.

Q. Did you know that some message had been sent in by the Van Nuys office suggesting that a number on Elm Drive in Beverly Hills **be called**?

A. I don't believe I did know that.

Q. I will show you what purports to be an inter-office communication between the Van Nuys office and the Beverly Hills office, or, the other way around, which reads as follows: "Relay Robert Cummings phone Crestview 67898 607 North Elm Beverly Hills **unkn.**" Did you see that message before you called the Brighton number, or before you called Universal?

A. No, I didn't see that message at all, because that went to Van Nuys.

Q. From your office? [392]

A. No. It went to Van Nuys from the Los Angeles office.

Q. Not from the Beverly Hills office? A. No.

(Testimony of Bernice Yorton)

Q. You didn't know anything about this message?

A. No, I didn't.

Q. Now, when you called the Brighton number, you are sure it was about 10:50 in the morning?

A. Yes, it was.

Q. Do you write the time down before you start reading or after you start?

A. After I start reading.

Q. Did you get this number the moment you tried it?

A. Yes, I believe I did.

Q. Did the woman answer the phone immediately?

A. Yes.

Q. What did she say?

A. Well, I said that I had a telegram for Robert Cummings, and was he there, or Oscar Cummins, and she said no, he wasn't there.

Q. Then what was said?

A. She said that she was Oscar Cummins' wife, and that she would take the message. So I read just the one telegram to her, and I told her that we had both of them the same, but I only read one, and that was all.

Q. Are you sure she said she was Oscar Cummins' wife? A. I believe she said that. [393]

Q. Did you ask her to take down the message?

A. Well, I wouldn't want to say that I did. She just said that she would take the message, and I read the telegram to her. I read it slow enough so that she could have written it down.

Q. Did you tell her you had two wires?

A. Yes.

(Testimony of Bernice Yorton)

Q. But you didn't read her the other one?

A. No. I told her they were both the same, and she said only one was necessary.

Q. Did you tell her where the other was addressed to?

A. Yes, one was addressed to the California Bank Building, and the other to the Sunset address.

Q. Did she make any comment about the Sunset Boulevard address?

A. No. As a matter of fact, she didn't seem very anxious about the message.

Q. What caused you to think that?

A. Usually when you call up people and tell them you have a message for them or somebody in their family, they at least seem interested enough to know what it is about. She didn't seem to care.

Q. How could you tell that?

A. By her tone of voice.

Q. What did she say besides saying, "I am Oscar Cummins' wife"? [394]

A. She said she was Oscar Cummins' wife and she would take the message.

Q. What else did she say?

A. Well, I guess that is all she said. When I told her we had a telegram, I don't know, she just didn't sound very enthusiastic about it.

Q. I understood you, in recapitulating the conversation, to say, when you got on the stand, that you said you had a wire for Robert Cummings, and she said he wasn't there, and you said it was in care of Oscar Cummins, and she said, "I am Oscar Cummins' wife."

(Testimony of Bernice Yorton)

Other than that, what did she say before you started reading the telegram?

A. Nothing—I don't think she did.

Q. From what you have given us here on the witness stand, you don't think she was very enthusiastic?

A. No, I don't think so. She might have been dropping an "ah" in there somewhere.

Q. When you finished the telegram, what was said?

A. She just said, "Thank you," and I said, "You are welcome," and hung up.

Mr. Roth: That is all.

Redirect Examination

Q. By Mr. Cooper: Is there some way that you remember this conversation?

A. Oh, I remember the whole thing very clearly, because I had to make so many phone calls. [395]

Q. To deliver this one message?

A. Yes.

Mr. Cooper: That is all.

Recross-Examination

Q. By Mr. Roth: You say you had to make some phone calls besides to Robert Cummings and to the Universal?

A. And Mrs. Cummins.

Q. Are you testifying that it is unusual for you to make more than two or three phone calls in order to get the addressee of a message?

A. Yes, it is; for one telegram, it is very unusual to have to phone three different places.

Q. And that is what impressed this on your memory?

A. Yes.

(Testimony of Bernice Yorton)

Q. Anything else?

A. And because it was for a person who was well known.

Mr. Roth: That is all.

Mr. Cooper: That is all. Are there any questions the court has?

The Court: What was the number of the telephone where the lady told you that she was Mrs. Oscar Cummins? A. That was this Brighton 04065.

The Court: Brighton what? A. 04065.

Mr. Roth: May I ask another question, your Honor?

The Court: Yes. [396]

Q. By Mr. Roth: When you relayed this to the woman who said she was Oscar Cummins' mother—

A. Robert Cummings' mother.

Q. Did you offer to read to her the wire?

A. No, I don't believe I did. She said for me to call this other number and they would take care of it, and that is why I didn't offer to read her the wire, was because she didn't ask me to.

Q. And are you sure this lady whom you talked to, who said she was Robert Cummings' mother, didn't tell you that Robert Cummings was out of town?

A. I believe she told me he was in the Army, that he wasn't in town, he was in the Army.

Mr. Roth: That is all.

(Testimony of Bernice Yorton)

Redirect Examination

Q. By Mr. Cooper: What else did this lady tell you?

A. That is about all.

Q. After she told you he was in the Army, why did you try to get him?

A. Everything was very vague at the time as to where he was. She said he was in the Army, and then she told me to call this Oscar Cummins number and I could get in touch with him through them, and that is why I called this other number.

Q. At the time she told you to call Oscar Cummins' number, she also told you to call that number because Oscar Cummins was his brother? [297]

A. Because Oscar Cummins was his brother; I believe that is what she said.

Q. Aren't you sure?

A. It is all kind of—but she said he was his brother, I believe is what she said. That is what I understood.

Q. If you can, and I don't mean to press you too much on this, I would like to have you take your mind back to the conversation with the lady who said she was Robert Cummings' mother, and tell me what you said and what she said, from the moment you got on the telephone.

A. Well, I just said, "This is Western Union and we have a telegram for Robert Cummings, and was he there," and she said, "No," that he wasn't, and I asked her where we could get in touch with him, and she said, told me to call this Brighton number and talk to Oscar Cummins, and she said he was in the Army, and I believe was stationed at Santa Barbara, or something, but she said I could get in touch with him through the Oscar Cummins' number, and that is about all that was said.

(Testimony of Bernice Yorton)

Q. Did she ask you to read her the telegram?

A. No, she didn't.

Q. Did you offer to read it to her? A. No.

Q. Did you tell her who the telegram was from?

A. No.

Mr. Cooper: That is all. [398]

Mr. Roth: That is all.

Mr. Cooper: Counsel, with reference to the stipulation as to Oscar Cummins having represented himself as a half brother of Robert Cummings, I understand you are willing to stipulate that he has informed people at Universal of that fact. Is that true?

Mr. Roth: Not "people." I am willing to stipulate that once, in the presence of Dan Kelley, and possibly in the presence of Mr. Muhl, either Robert Cummings or Oscar Cummins referred to each other as half brothers. I am willing to stipulate to that.

Mr. Cooper: I will accept that, but I would like to call another witness for one question. I am going to suggest a further stipulation, that Robert Cummings also told Bob Speers the same thing, that he was a half brother of—

Mr. Roth: I don't know anything about Speers.

Mr. Cooper: That is about the only question. I wanted to call Bob Speers for that.

Mr. Roth: I will stipulate to that.

Mr. Cooper: Very well. May we have a stipulation about that "Br" number, Brighton 04065?

Mr. Roth: We stipulate that that number, Brighton 04065, is and was the listed telephone number of Oscar Cummins.

Mr. Cooper: We will so stipulate. We rest, your Honor.

Mr. Roth: We have rested, and we do rest, except for this new matter in respect of this telegram, in which matter [399] I suggested this morning to the court that I would like to bring Bob Cummings in to testify that his home was closed on these particular dates and there was no one there. And since hearing the last witness, who testified that she spoke to Bob Cummings' mother, I would like to bring her in.

Mr. Cooper: I think you should. I am not in a position to stipulate to it. If there was some basis on which I could stipulate, I would be very happy to do so.

The Court: Will you have them here at 9:00 o'clock in the morning?

Mr. Roth: We have telephoned Robert Cummings already, and he will be back tomorrow, and we will make every endeavor to get him here by 9:00 o'clock tomorrow morning. And I am certain, unless she is ill, if his mother is in good health, we will have her here at 9:00 o'clock in the morning.

Mr. Cooper: If your Honor please, neither of us has offered the telegrams of which we inquired of Mr. Meaney. Does your Honor desire to have those offered in evidence, or does your Honor have sufficient information?

The Court: I think if we just have an understanding with Mr. Meaney, of the Western Union, that they will hold onto those records, that we will not ask at this time at least, that they be made a part of the court's file.

Mr. Cooper: The record may show that I am handing these records to Mr. Meaney.

The Court: Mr. Meaney, is there any likelihood of those [400] records being destroyed?

Mr. Meaney: No. I will be glad to hold them, your Honor.

The Court: Very well, then. I will accept that.

Mr. Cooper: I have been informed that the Federal Communications Commission permits them to be destroyed after three months.

Mr. Roth: I think Mr. Cooper has also agreed that he would stipulate that this Sunset Boulevard address, that that building has been closed for some months prior and some months since the date of that wire.

Mr. Cooper: If you tell me that that is the fact, I will stipulate to it.

Mr. Roth: I understand it to be a fact.

Mr. Cooper: That is perfectly all right. I will accept the stipulation.

The Court: Has been closed how long?

Mr. Roth: Since June 1, 1942.

Mr. Cooper: Let us put it this way, that he moved out of there at what time?

Mr. Roth: May 30, 1942.

Mr. Cooper: And never returned?

Mr. Roth: And never returned. And that the building itself has been closed since that time.

Mr. Cooper: At least I will stipulate it up to the date of the telegram. I think the balance is immaterial.

Mr. Roth: All right. [401]

The Court: Now you may proceed.

(Further argument by Mr. Roth.)

(Whereupon an adjournment was taken until 9:00 o'clock a. m., Tuesday, January 11, 1944.) [402]

Los Angeles, California, Tuesday, January 11, 1944;
9:00 A.M.

(Parties present as before.)

Mr. Roth: Call Mrs. Cummings.

RUTH K. CUMMINGS,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Roth: Mrs. Cummings, where do you reside?

A. I live in Van Nuys, 7241 Hazeltine Avenue.

Q. How long have you been living there?

A. Well, since June, 1940.

Q. Is that close to where your son, Robert Cummings, lives?

A. Yes. It is a four-acre tract, and my house is about a block from his house, but it is all within the same fenced tract.

Q. You are the mother of Robert Cummings?

A. I am.

Q. Can you recall whether or not you were called up on a Sunday morning, April 11, 1943, by Western Union?

A. No.

Q. By that you mean that you can recall that you were not called up?

A. Well, I wouldn't be where I could take a message on [403] Sunday.

Q. Were you in your home that Sunday morning?

A. Well, naturally I would be there early in the morning.

(Testimony of Ruth K. Cummings)

Q. Do you have any recollection of having been called up by Western Union and asked to take a message on the Sunday morning of April 11, 1943? A. No.

Q. Do you have any recollection of having been called up by Western Union and asked to take a message, on that Sunday morning, April 11, 1943, for Robert Cummings? A. No, I haven't.

Q. Did you have any conversation with the Western Union telephone operator or Western Union girl on Sunday morning, April 11, 1943? A. No.

Q. At all, on that Sunday morning? A. No.

Q. Did you have any such telephone conversation with the Western Union operator with respect to a message for Robert Cummings on Monday morning, April 12, 1943? A. No.

Q. What is your telephone number, Mrs. Cummings? A. State 52657.

The Court: Was that your telephone number on April 11, 1943?

A. It has been my telephone number ever since I have had [404] a telephone out there. I have had no change.

The Court: Since sometime in 1940?

A. Well, yes, or perhaps later, because I live in my house, which is separate and apart from Robert Cummings' house, and I live alone in my house.

Q. In distance, tell us, if you can, about how far is Robert Cummings' house from your house.

A. Well, it must be nearly a block, to pass through the orchard from his house to my house.

Q. Out there in your house do you hear the telephone ring in Robert Cummings' house? A. No, I cannot.

(Testimony of Ruth K. Cummings)

Q. On the Sunday morning of April 11, 1943, did you hear the telephone ring in Robert Cummings' house?

A. No.

Q. Did you take any message in Robert Cummings' house on that morning?

A. I wouldn't be there to take it, because his house was closed.

Q. Were you there? A. No.

Q. Do you know whether or not Robert Cummings had a secretary residing at his house on April 11, 1943?

A. No, he has no secretary residing in his house. He has never had one.

Q. Do you know that Robert Cummings was not at home on [405] April 11, 1943?

A. Well, he wasn't at home, because he was gone. He had been gone for a year and a half, and his house had been closed. Of course, there were intervals when he came in.

Q. On this particular Sunday morning, do you know whether that was one of the intervals when he was not there? A. Well, I am pretty sure it was.

Mr. Roth: You may cross examine.

Cross-Examination.

Q. By Mr. Cooper: Mrs. Cummings, do you have some way of fixing that date in your mind, as distinguished from other Sundays?

A. Well, Sundays are my days of rest, and I go to service, and, if I don't I stay in my house, so there would be no occasion for me to be answering phones in Bob's house.

(Testimony of Ruth K. Cummings)

Q. What time do you go to services?

A. Well, since I don't drive and there is no one there to drive me, when we have no servants, and we usually have none on Sunday, and at that time I don't think we had any, because Bob was away on other business, and I have to take a street car, and it takes me at least two hours to get into Los Angeles where I go to service.

Q. And the service starts at what time?

A. Well, some places at 10:30, where I go, and some places at 11:00.

Q. You do not go every Sunday, do you? [406]

A. Well, it is my usual custom to go.

Q. There have been some occasions, Mrs. Cummings, when you didn't? A. Naturally.

Q. Mr. Smith is your son's servant? A. Yes.

Q. How long has he been employed by your son, if you know?

A. Well, he was employed before my son moved to the valley. He has been in his employ, I should say, some five years.

Q. Does he work in your son's home?

A. Not now, and hasn't since Bob has been away.

Mr. Cooper: That is all. Thank you very much.

Mr. Roth: Thank you, Mrs. Cummings. That is all.
Robert Cummings. [407]

ROBERT CUMMINGS,

the plaintiff, having been heretofore duly sworn, upon being recalled, testified as follows:

Direct Examination.

Q. By Mr. Roth: Mr. Cummings, do you have a secretary? A. Yes, sir.

Q. Who is that secretary?

A. Bella Marco was the secretary, and just recently, because of the fact that she is going to have a baby, we have another secretary, Miss Lillian Starlap.

Q. Has that secretary ever lived at your home?

A. No, sir.

Q. Where does that secretary work?

A. At 527 California Bank Building.

Q. Is that the office of Oscar Cummins?

A. It is.

Q. Have you ever had Bella Marco or the other girl you mentioned out at your home to take messages for you?

A. No.

Q. Do you know whether or not there was a secretary in your home on Sunday, April 11th, 1943?

A. I have never had a secretary in my home.

Q. Either one of the girls you mentioned?

A. No.

Q. In other words, you have used the secretary of Oscar Cummins, and you refer to her as your secretary?

(Testimony of Robert Cummings)

A. That is right. I pay her a little extra money to take care of my secretarial work.

Q. Has Bella Marco ever been in your home in her life? A. Yes.

Q. How long ago?

A. I should say about three months ago Bella Marco and her husband came to my home on a Sunday, and I was home at the time and showed them around the ranch, and we sat outside at the pool and had a drink.

Q. Is that the only time she has ever been there?

A. Yes.

Q. Has this other girl you mentioned ever been out at your home? A. No.

Q. Were you in Van Nuys or Los Angeles on Sunday, April 11, 1943?

A. I believe that was a day that I was flying with the Civil Air Patrol at Quartzsite, Arizona.

Mr. Roth: You may cross examine.

Cross-Examination.

Q. By Mr. Cooper: Mr. Cummings, where does Mr. Smith work? A. Where does he work now?

Q. Where did he work in April or May or June of last year?

A. In April and May and June of last year—I believe at that time Jimmie had gotten a job working at Douglas [409] Aircraft factory at night, right around that period,

(Testimony of Robert Cummings)

because I wasn't working in pictures, and he felt that he should do something more important to the war effort than work for me.

Q. In November of this year he was working for you, was he not? A. This year?

Q. I mean 1943, when he made this affidavit and made this phone call for you.

A. No. As a matter of fact, he came out to the ranch quite often, because Jim has been more or less of a friend of mine for years, and we have eggs there, and he came out to the ranch there and sort of as a gesture of friendship he would bring his own car out, and sometimes he would take some eggs into town and sell them, and occasionally he would do something like driving my mother into town, because she has no transportation, but officially he was not working for me.

Q. On the occasions that he would come out there he would stay over night, would he not?

A. Sometimes, yes.

Q. And when you left was there anybody on the grounds other than your mother? Did your mother stay alone? A. You mean—

Q. When you went to Quartzsite, for example.

A. Sometimes my mother would stay alone. Sometimes she would bring a friend of hers out, who was also a minister, a [410] Mrs. McLaughlin, and she would stay with mother.

(Testimony of Robert Cummings)

Q. When Smith stayed there where did he stay?

A. He stayed in a little house on the ranch, an old house, where we called the caretaker's house, and there is a bedroom in there.

Q. Who took care of the cleaning at your place?

A. The cleaning?

Q. Yes, the necessary house work that had to be done.

A. That was done by my mother.

Q. Your mother would come over and clean your house?

A. If there was any necessity, yes.

Q. Your mother had a key to your place?

A. Yes.

Q. Did anybody else have a key to the place? Did Smith have a key to your place?

A. Yes.

Q. Who else had a key to your place?

A. That is all.

Q. Do you have a fence around your house?

A. Yes.

Mr. Cooper: That is all.

Mr. Roth: I have Mrs. Adeline Cummins in the courtroom this morning too, and I would like to recall her for just one question.

The Court: Yes. [411]

ADELINE CUMMINS,

a witness heretofore duly sworn on behalf of plaintiff,
upon being recalled, testified as follows:

Direct Examination.

Q. By Mr. Roth: Testimony was given yesterday by a Western Union Employee, Mrs. Cummins, that on Sunday morning, April 11, 1943, she telephoned your house and asked who was at the other end of the line, and was told that it was Mrs. Oscar Cummins, and asked for Robert Cummings, and delivered a message to a Mrs. Oscar Cummins, on behalf of Robert Cummings. Does that statement by me of what the testimony was yesterday refresh your recollection any as to whether or not you received a message on Sunday morning, April 11, 1943, for Robert Cummings?

A. No, it doesn't. I am sure I didn't receive any such message.

Mr. Roth: You may cross examine.

Mr. Cooper: No cross examination.

Mr. Roth: That is all. That is all we have, your Honor, in the way of testimony.

The Court: May I inquire—counsel's recollection is likely to be more accurate than mine about this—was the telephone number State 52657 mentioned in the testimony given yesterday?

Mr. Cooper: I do not believe so, your Honor.

Mr. Roth: It was not, your Honor. There was a Sunset [412] number mentioned, but no State number was mentioned. There was a Sunset number and a Br num-

ber, and also a Crestview number that was called on Elm Drive, but there was no St number or State number on any of those papers.

Mr. Cooper: That is correct.

The Court: Now, with reference to the telephone numbers that were mentioned yesterday, do we have in the record anything to identify who resided at the house having the telephone with the preface "Sunset"?

Mr. Roth: I think the Sunset number—one of those numbers was the Universal number—I am not certain whether it was the Sunset number or not.

Mr. Erlich: Sunset. One of the Sunset numbers is Universal. The other Sunset number—I can tell you that number in just a moment by referring to the phone book.

Mr. Cooper: Can you determine the Universal number?

Mr. Erlich: Yes.

The Court: I am not interested so much in ascertaining the telephone number of defendant. Does the record identify who resided at the places bearing any of the other telephone numbers, besides the telephone number of Mr. Oscar Cummins?

Mr. Roth: I think it does, to this extent, your Honor. In respect of the Crestview number, the testimony shows that it was called and ascertained that Robert Cummings didn't live there and no one knew Robert Cummings that lived there. In respect of the Sunset number, the number which refers to [413] Universal, the testimony was that the number was called to get an address for Robert Cummings. In respect of the Brighton number that was called, it is stipulated that that was and is the telephone number of Oscar Cummins.

The Court: All that is clear to me. Now, with reference to any other numbers, have we any identification?

Mr. Roth: I don't think there were any other numbers. There may have been one other Sunset number.

Mr. Cooper: Yes, Sunset.

Mr. Roth: Bob Cummings, that is Sunset.

Mr. Joseph Cummins: 22636.

Mr. Erlich: The Universal number is Sunset 22171.

Mr. Cooper: It is my recollection, if your Honor please, that all of the numbers were identified in the record. Is that your recollection?

Mr. Roth: I thought so, Mr. Cooper.

The Court: Now will you repeat the telephone number of the plaintiff.

Mr. Cooper: Sunset 22636.

The Court: Very well, Let us proceed.

(Further argument by Mr. Roth.)

(Further argument by Mr. Cooper.)

The Court: Let me assure counsel that there is never any occasion to thank the Judge for participating in the trial of a case and doing his duty in the matter. I have enjoyed this trial, for reasons that I think are quite patent. [414] Both sides have been ably presented, and both sides have been represented by counsel who have been pre-eminently fair and candid, not only with the court, but with each other. Sometimes presiding at a trial is a sort of a punishment, but I do want to say to counsel that it is in the nature of a reward when the Judge is privileged to preside at a trial conducted by counsel with the thoroughness and the patience and the ability and fairness exhibited by both sides in this case.

I am not, of course, in a position to express final conclusions, either as to the law or the facts, at this particular moment. I just indicated that I desire to examine, among various portions of the evidence, the memoranda from which some of the witnesses testified. I think it is not out of place, however, to make a few observations.

As I said a moment or two ago, neither side contends that any one of the telegrams of April 10, 1943, was physically delivered, either to the plaintiff or to anyone purporting to represent him or anyone purporting to have any contact with him. And, having in mind the imperfections with which we are all handicapped, including inaccuracy of recollection, one can understand various differences between the testimony of some of the witnesses. I am persuaded that it is inherently improbable that whoever it was who listened to the reading of that rather lengthy telegram of April 10th, either wrote it down or recalled it exactly. I think the most [415] likely picture that can be given of that episode would be that the listener remembered the fact or the facts of Universal Pictures Corporation sending a wire requiring the services of Robert Cummings, and might also remember the date when he was to appear. Those matters might readily stand reasonably clear in the mind of the listener, who, some time thereafter, might repeat it.

I think it is equally clear that, because of matters which had transpired between the plaintiff, on the one hand, and the defendant, on the other, prior to April, 1943, there were strained relations between the plaintiff and at least one, if not more, of the executives of the defendant, and that that strained relationship existed as late as April, 1943, and, further, that Mr. Speers was given what might

be described as an unusual assignment, so far as dealing with the plaintiff was concerned. And I think, as defense counsel very frankly stated a few moments ago, that at least during the conversations between the plaintiff and Speers that antedated the sending of the telegrams of April 10th, it could not fairly be charged that the plaintiff was seeking to break the contract by, in effect, threatening that unless he got a new deal from the defendant he would give all of his time either to the Civil Air Patrol or to some other military service.

I think it is also fair to say that the plaintiff, so far as anything disclosed in the courtroom may be considered, [416] including his testimony, both direct and cross, has evidenced no feeling of either ill-will or of resentment or of anger against any of the defendant's executives. His manner, his attitude on the stand, his demeanor, as we call it, has impressed me as rather exceptional in that regard, and particularly because of the contrast which has been displayed by some of the witnesses on the stand. If my appraisal of these witnesses is sound, I cannot say that Speers was equally charitable, and, before reaching a conclusion as to how much credence to give to certain of the defendant's witnesses, as I have already indicated, I want to examine painstakingly the copies of the memoranda from which they testified.

Then, too, both when we come to weigh the facts, as well as determine the legal conclusions to be drawn therefrom, I am not yet clear as to the reasonableness of send-

ing a notice such as this telegram of April 10th after 6:00 P. M. on a Saturday night, requiring the appearance of the artist on the following Monday morning. As I say, that question comes to my mind, and it may have some bearing on just really what was the motive in sending the telegram, in view of that circumstance, having in mind that, at least by April 9th, the executives of the defendant who were concerned in the matter were aware of at least their own interpretation of plaintiff's position.

On the other hand, I expect to give serious consideration [417] to the point, among others, that defense counsel has emphasized today, that the requirement of the contract that plaintiff be available at all times in Los Angeles, unless excused in writing, and the circumstance that he was continuously absent from Los Angeles County during the period extending from at least May 19th to the evening of May 28th, constituted a breach on the plaintiff's part, and, even though the defendant were ignorant thereof at the time it refused to pay him compensation, that that breach constitutes sufficient legal justification for the omission to pay. Again it is not clear in my mind as to what bearing upon that contention is to be found in the circumstance that about April 12, 1943, the defendant took the position that plaintiff was suspended for the duration of the war.

I see that it is almost 11:00 o'clock, and we shall excuse counsel, particularly defense counsel. We will mark the matter submitted.

[Endorsed]: Filed Dec. 12, 1944. [418]

REPORTER'S TRANSCRIPT

Of Hearing Motion of Defendant for Order of Dismissal as to 1st and 2nd Causes of Action and Judgment on the Pleadings as to the 4th Cause of Action, Pursuant to Notice Filed 5/10/44.

Los Angeles, California, Monday, May 29, 1944, 10:00 A. M.

The Clerk: No. 3242, Robert Cummings vs. Universal Pictures Company.

The Court: The calendar shows that we have noticed for this morning, in the case of Cummings vs. Universal Pictures Company, two motions on behalf of the defendant; one for an order of dismissal as to the two counts on which the case proceeded to trial; the other is a motion for judgment on the pleadings with respect to the fourth and remaining count.

Mr. Lewinson: May I proceed, your Honor?

The Court: Yes.

Mr. Lewinson: May it please the court, as your Honor has indicated the case is before the court on two motions made by the defendant; the first is to dismiss the two causes of action that have been litigated, and the second is for a judgment on the pleadings on the cause of action which has not been litigated, that being the fourth cause of action; the two causes of action that have been litigated being the first and second causes of action. The third cause of action was voluntarily dismissed at the trial.

The basis of the motion to dismiss is that neither count states a cause of action, and the reason why neither count

states a cause of action is that there is no allegation in the pleadings, in either count, that the plaintiff has [2] performed the conditions of the contract which were to be performed by him, or there are no allegations showing that he was excused from performing the conditions which were to be performed by him. The basis of the motion for judgment on the pleadings is slightly different, but substantially the same. The fourth count, while in terms alleging—that is to say, in general terms by way of conclusion—that the plaintiff has performed all conditions to be performed by him, shows by its affirmative allegations that those conditions were not performed. In that behalf, the fourth count shows that the plaintiff was under the duty to perform in pictures which were assigned to him. That is shown by the contract itself which is annexed as an exhibit to the complaint. Then is set forth certain conversations between the plaintiff and an officer of the defendant when the plaintiff was called upon to perform in the picture called "Fired Wife," and the gist of that conversation was that plaintiff said he wouldn't perform in a picture of that kind; and these officers said he was right. They didn't say according to the pleadings he had a legal right to do it or that his contract permitted him to take that position, but they said he was right in the stand that he wouldn't have to do it. They then changed their minds and insisted on the contract.

The cases cited show that an oral agreement which is not executed cannot modify a writing. I am not going to [3] supplement the memorandum on file on that point, because the point is not contested, as I understand, in the memorandum filed by the plaintiff, and it can't very well be contested. I will call your Honor's attention to the facts which your Honor has doubtless already noted, that the

motion is made not on the pleadings, but on the evidence in the case. It is rather fortunate that the motion was so made, because the attempts to meet the motion here are based upon the evidence in the case. And that was contemplated, of course, at the time the motion was made. It was also contemplated that properly an application might be made to amend; and under the federal practice a motion for dismissal could not be granted if an amendment can properly be allowed. The evidence shows, I think, and I will comment on that briefly in a moment, that no such amendment could be made, and, indeed, there is no application for the amendment.

It is interesting to note, your Honor, that there is no attempt to meet either motion, and I will confine myself to the motion to dismiss, because the other motion isn't contested. There are the usual facts and circumstances covered by the memoranda on file. There is no attempt to meet the motion to dismiss on the merits, and there couldn't very well be, because an examination of the pleadings shows an absolute absence of allegations that the defendant performed or that he was excused from performing.

The Court: You mean the plaintiff? [4]

Mr. Lewinson: The plaintiff, I should say. Now, how does the plaintiff undertake to meet the motion to dismiss? In the first place, he asserts the case is no longer on trial, or in effect asserts that, and, therefore, that the motion is not in time. It is true that under the new rules of practice in the federal courts that a motion to dismiss because the complaint fails to state a cause of action must be made during the trial, otherwise the motion is waived. There isn't any doubt about that. In that respect it might

be stated, although it is hardly necessary to comment upon it, that the federal rules inaugurate a vastly different system of pleadings than has hitherto prevailed in our English-American courts, but we take the rules as we find them. The only question is, is the case still on trial? There isn't any doubt about that. It is necessary to cite cases on that point, if your Honor please, because they are not cited in our memorandum. And in order to save the time of the court I hand the court a memorandum of the cases that will be cited, and hand them to counsel. That will save the time of taking notes, as well as the time of argument. May I do that, your Honor?

The Court: Yes.

Mr. Lewinson: There are two cases cited on the point to which I now call your Honor's attention. The first one, a decision of the United States Circuit Court of Appeals, [5] in which the opinion is by Judge Sanborn of the Eighth Circuit—the late Judge Walter Sanborn—and the opinion cites numerous cases to the proposition which is quoted in the memorandum which I have just handed the court, namely, “The trial ends only when the finding is filed, but if no finding is filed before, when the judgment is rendered.” The emphasis is on the word “only.” There having been no finding yet filed by the court, the case is still in the bosom of the court; the case is on trial and the motion is timely.

The next effort to meet the motion is made in various phraseology, but it all comes to this: It is claimed that because of the answer filed and because of the evidence taken at the trial, that the point is waived. We have cited a number of cases showing that those points are not well taken. In the first place, the rule is as indicated in the

memorandum, that a defective complaint may be aided only where the answer affirmatively alleges the very fact that is missing from the complaint to make it sufficient. Of course, there is no allegation in the answer that the plaintiff performed or was excused from performing; nothing of the sort. Then it is also held that a finding may be made on evidence introduced without objection where the pleading is defective in form, but not where the evidence "is outside of any issue presented in the pleading." The cases on that are cited to the court. [6]

Without going into detail on those points, because they are simple points of proceeding and it is unnecessary to elaborate them, I am going to present the case very briefly, your Honor, on a hypothesis which is much more favorable to the plaintiff than the authorities, and that is on the hypothesis that it may be contended on their part, as it has been contended not only in this memorandum filed responsive to the motion, but also in the memorandum filed responsive to our objections to the pleadings, that the evidence fails to show a repudiation on the part of the plaintiff, although efforts are made in that behalf. Your Honor will recall—I assume you have read the memorandum that we filed in support of the objections to the findings?

The Court: Not in its entirety; no.

Mr. Lewinson: Well, your Honor will read that, and there is no point in taking the time of the court in open court to canvass the things that are covered in detail there and which are much more easily assimilated with the eye than by the ear, at least by counsel arguing the case. But there are two points which are undertaken to be made: one in the first memorandum filed, that is, the memorandum filed in response to our objections, and the supporting authorities; and the other in this later memorandum. The

first point that is made is that reading the record as a whole the evidence does not show that the plaintiff repudiated the contract. Nothing is said in support of that assertion. [7] That is a bald assertion. I have read the record as a whole, and I have read it in detail. Your Honor has a copy of the full transcript, do you?

The Court: Not on the bench here.

Mr. Lewinson: But you have it available?

The Court: Yes.

Mr. Roth: Do you want to use mine?

Mr. Lewinson: I am going to refer to it. It is referred to in the memorandum or the brief, and I am not going to take the time of the court to go into matters of detail of that sort, but I want to say this to the court: That the question of repudiation arises from several conversations had between the officers of the defendant and the plaintiff here, Robert Cummings, and his agent, Oscar Cummins. I will refer to them as Robert and Oscar, if I may take that liberty, in order to avoid confusion, because of the similarity of names. I have set forth in the memorandum all the evidence which appears on that conversation or those conversations which came from the lips of Robert and Oscar. I have omitted the evidence that came from the lips of the officers of the defendant, and I have assumed, following the suggestion that your Honor made in his memorandum, that the evidence of the defendants was to be rejected. Assuming that for the purpose of this argument. The evidence of the officers of the defendant—I will say the defendant—and the evidence of the [8] officers of the plaintiff—the plaintiff and his agent—come to the same thing. It is a case, if I may repeat a quotation from the old Georgia decision in another case I

referred to once, or perhaps more than once, a case that the driver was drunk but the carriage reached home. As far as the law is concerned, the evidence comes to the same conclusion. The result of that is this: While the plaintiff and defendant gave somewhat different versions of the various conversations, on either version the plaintiff declined to go on with his contract. At best, the version of plaintiff and his agent as to what occurred is this: The plaintiff was called upon to play the part of "Hank" in "Fired Wife." He said he wouldn't do it. He refused flatly to do it. There is no dispute about that. There is no dispute but that was a breach on his part. In other words, he was obligated to do it. Without going into the effect of the breach, which I will refer to presently, Robert and Oscar went further. They said the plaintiff would not perform in any similar pictures and he wouldn't perform in any pictures that were merely for the purpose of commercial success or making money by the defendant, and he wouldn't perform in any pictures unless they were in the interest of the war effort, and he wouldn't perform in any pictures unless he could select the associate actors and unless he could select the director and approve them. That is the gist of the testimony of Robert and Oscar, and [9] there isn't any question about it. Nowhere in the record have they said anything that was inconsistent with that, and nowhere in the record did the witnesses for the defendant say anything that was repugnant to that. The version of the conversation on the part of the officers of the defendant was that Robert and Oscar refused to go ahead, but they refused to go ahead because Robert said he was going into the Civil Air Patrol in the government service and was going to devote his entire time to the war effort. That was the reason. I am by no means con-

vinced, from a thorough examination of the record, which isn't now being argued, that the version of the conversation given by the defendant is not the true version. But be that as it may, the whole question is not what Oscar said and not what Robert said, in detail, but did they say something which indicated that Robert would not go on with his contract? That is the proposition before the court, and nothing has been suggested in the memorandum responsive to our memorandum which is in any way inconsistent with the evidence or qualifies the evidence which we have set forth. So I submit it to your Honor on the examination of the record, and I have set forth the relative facts and have confined myself to the uncontradicted evidence, because on the objections to the findings or on this motion I didn't care to go into the weight of the evidence. That is too big a job, and that is properly the office of a motion for a new [10] trial and not a proceeding of this kind. The only point that the plaintiff made in his first memorandum, after this point had been raised and the evidence had been set forth, was that if you read the record as a whole, and we have done so—I remember arguing a case in the Circuit Court of Appeals some years ago, when Judge Rudkin was senior judge, and I undertook to review the pleadings. It was a case which Judge James had dismissed with prejudice on the ground that the cause of action wasn't stated by the pleadings, and I suggested that the best way to construe a pleading was to read it. And Judge Rudkin said, the only way to construe it was to read it. But I don't think the whole burden of the record should be imposed on the court, unless counsel can show that we haven't consistently set forth the contents. Unless counsel can do that I think your Honor should accept our digest of the record. If your Honor wishes to re-read this testi-

mony we welcome that labor on your Honor's part. That is the status of the record, so far as the first brief is concerned. In the second brief—

The Court: Before you leave the first proposition, do I understand the contention that has just been discussed is that the only reasonable inference that may be drawn from the testimony of the plaintiff, and the other evidence offered in his behalf, is that he declined to make any pictures, except that they would conform to certain conditions? [11]

Mr. Lewinson: Except conditions that he had no right to impose.

The Court: Yes.

Mr. Lewinson: That brings me to the very next point that counsel has undertaken to make in their second brief—

The Court: Before you go into that second proposition, is it your position that plaintiff did not in substance and effect advise the defendant that if, as to this particular picture "Fired Wife," the director were changed, that he would not go on, even though he took exception to certain of the cast and even though he thought the script was, as one witness called it, "crap"?

Mr. Lewinson: He called it that himself, your Honor. I think, from a preview of the evidence, my answer should be, "no." I want to state frankly, however, if you take Oscar Cummins' testimony alone, the answer might conceivably be, "yes." In other words, on the later conferences that Oscar Cummins had he testified in effect, and that is set forth in my brief, that under no circumstances would they work under that director. That was out of the question. That's all he said at that time. If you were to assume that's all that was said at any time, and left that

out of its context and disregarded the testimony of Robert and the other testimony of Oscar, then you could say that that was the only condition that he imposed; but if you read the evidence as a whole, which I have set forth, you would have [12] to say that he imposed three or four or half a dozen additional conditions. But even if he imposed only one condition that he had no right to impose, it comes to the same thing.

The Court: As to that one picture, it is admitted that there was a breach.

Mr. Lewinson: Of course, but he said he wouldn't perform in any pictures like it; I have quoted that, your Honor; or any pictures of that character; and he uses various phrases which project his attitude toward "Fired Wife" into the future and applies that to other pictures of that character. Now, if it was a breach not to play "Fired Wife," and he said he wouldn't under any circumstances play any other picture of that kind, that was a repudiation. That is my point.

And, your Honor, may I say this: I could understand, if I may say so, how the evidence, of the character which is set forth in detail, alluded the court, and perhaps counsel in the case, too, when it was delivered from the witness stand, because it was given as a sort of rambling story about what occurred, and it may very well be that the witness' voice dropped when he answered to a particular thing. But be that as it may, when you read it in the cold record there isn't any doubt about it. He said in varying forms that he not only would not produce that picture, but he would not produce any other picture. I am going to say [13] this, while we are on that point—I was going to take it up separately, but I can just as well take it up now—In our memorandum in opposition to the findings we

cite a California authority which is expressly to the effect that a man who has first breached a contract may not later undertake to terminate it or to bring an action because of a subsequent breach on the part of the other party. There is no attempt whatever in either of these two briefs lately filed to meet that point, and that point is decisive and without repudiation.

Coming back to the repudiation, your Honor, I can read from the brief, but I think again your Honor will get that better from the reading than you would from my reading of it. If you would care to have me read it—

The Court: No. I am merely interrupting to make certain that I am following the discussion.

Mr. Lewinson: Your Honor, I am trying to convince you; I am already convinced myself; and I welcome interruptions. Now, your Honor, as I said, I am presenting this matter now on their contention of waiver; in other words, that they proved a cause of action even though they didn't allege it and it nowhere appearing in the pleadings. I have shown that the evidence is as I have indicated; that they haven't made any effort to meet it; they have just tried to meet it by forgetting it, where possible. They apparently realized that when they came to file their second [14] brief, because they raised a point which isn't responsive to anything said in our memorandum, but I am glad they did raise the point, because it makes it possible for me to make the thing much more explicit than it was made before. I took it for granted, as I think any lawyer who has been through the law of repudiation—and I have been through it a half a dozen times in other cases—that the language used by Oscar and Robert constitutes a repudiation, because it undertook to impose conditions that they

had no right to impose. I didn't cite authority on that subject, because it seemed obvious. Counsel comes back and they attempt to meet it by cases, which they cite, in which it is said in very general language that in order to be a repudiation the refusal to go ahead must be unequivocal. There isn't any doubt about that. They seem to think it answers the point. We submit it doesn't answer the point, because the cases very explicitly hold that the refusal to go ahead, except on conditions which aren't in the contract, constitutes a repudiation and is an unequivocal expression not to go ahead. The California cases are very clear on that, and our code is clear on it. Under our Point 4, in this little memorandum which I have handed to your Honor this morning, we cite four California cases, and the code section, if I may use the inelegant expression, is right on the nose on that proposition. And an examination of the cases, where I have given the page reference and where the discussion occurs, [15] supports our position. In the very latest case on the point the matter is phrased somewhat differently by our California Supreme Court, and our Supreme Court cites one of the cases which I have referred to already and which phrased it the way I have phrased it: and also, our Supreme Court in that case quotes or paraphrases the Restatement of the Law. I have given the citation, but I will give your Honor the quotation. It doesn't appear in quotes, but it should appear in quotes. I am quite sure. It appears in the advance sheets. *Gold Min. & Water Co. v. Swinerton*—it is on the second page of this memorandum—23 A. C. 19, 29, in which the court said: "A contract is totally breached and an anticipatory repudiation occurs when the promisor without justification and before he has committed a breach, makes a positive

statement to the promisee indicating that he will not or cannot substantially perform his contractual duties.”

They have gotten away from that old and inartificial way of saying, “Unequivocally repudiates it,” because that doesn’t mean anything. That is a statement which, I think, is lifted bodily from the Restatement, although credit isn’t given in the opinion for it. But the other cases, which are cited under Point 4, use the language I have used, explicitly, that where a person offers to perform on conditions he refuses to perform altogether and he is guilty of a breach. [16]

There is another suggestion that I would like to make to the court, and that is based in part on a case which isn’t cited in the memorandum handed to your Honor this morning, and if your Honor cares to look at it it is Great Lakes—

The Court: On this fourth point?

Mr. Lewinson: No; it isn’t the fourth point. It is a point which stems from the fourth point, but it is slightly different. It is Great Lakes Dredge & Dock Company v. Huffman, 319 U. S. 293; 87 Lawyers Edition, 1407; decided in 1943.

The Court: May I have the page in 319 U. S.?

Mr. Lewinson: Yes. 293, your Honor. That is a decision in which the opinion is written by Chief Justice Stone, and it holds that a declaratory relief action is, for all substantial purposes, a suit in equity and that the equitable doctrines which stand in the way of recovery obtain in a declaratory relief action. Now, I suggest, your Honor, that it appears from the evidence here that the plaintiff has been guilty of unclean hands and, therefore, in no event could he recover in a declaratory relief

action or be permitted to stultify himself by amending his pleading, should he ask to do that. And my point about the matter is this, and, as I say, it stems from the fourth point, and the cases which deal with the point are found in our second memorandum; that is to say, the memorandum filed [17] in support of this particular motion here, which is entitled, "Further Memorandum in Support of Motion to Dismiss and for Judgment on the Pleadings," and I refer to the fourth point there, pages 4 to 7. It is said that that point is not in the memorandum which counsel filed and is not in any way referable to the situation here. I think it is not only on the matter of repudiation generally, but also on the matter of unclean hands. And may I call attention to a bit of evidence in the case? Your Honor will probably recall it. We have this sequence: We have Robert Cummings first breaching the contract by refusing to play the part of "Hank" in "Fired Wife"; then we have him repudiating by giving notice that he won't play in any similar pictures or in any plays, except on conditions that he has no right to impose. And we have no withdrawal of that repudiation at that time. Now, something was said about that at the trial, but this feature of it was not emphasized, and the cases which I have cited and the code section which I have cited were not brought to the court's attention. Here is the evidence that I would like to offer, following the sequence that I have indicated: We had "Hank" performed by another actor; and, of course, they have indicated that the defendant was put to a great inconvenience, because it wasn't until after it had the plaintiff lined up for the playing of "Hank" that the plaintiff refused unequivocally to go ahead and, therefore, there were delays that must have [18] entailed expense. We have that further situation; then what do we have? We have

Oscar having an appointment with Mr. Muhl, the secretary of Universal in charge of the contract department, and he says nothing whatever about withdrawing that repudiation or being willing to come back to work. He avoids any discussion of Robert Cummings and his affairs with Muhl. Then that very afternoon he goes around to what you might call a mechanical employee, an employee without discretion, a paymaster, to do what? To make a demand. Of course, he wasn't bound to make a demand if he wasn't in default, but apparently he thought he was, so he went around to find out whether the money was available, and he found out it wasn't available. Why? Not because Universal had excused Cummings from the contract or accepted his repudiation or had itself refused to go ahead, but because he was under suspension by reason of his repudiation. All right. Then Oscar Cummins apparently goes back to his office and he sends a chauffeur around, in what I would term a sneaky sort of way—and I use the term “sneaky” conditionally; not sneaky to make a demand, but to make the inquiry because he said he believed all the time the money would be there; and the chauffeur made an inquiry and got the same answer. Then Oscar Cummins had his secretary call up and somebody listened over the telephone and took the conversation down, and she made the same inquiry. Why did not Oscar Cummins discuss the matter with [19] Muhl, if your Honor please? He knew Muhl would have said, as the notice indicated, “All you have to do is to have Bob report for duty and tell us he is willing to go on, and his check will be available.” Now, that is unclean hands, but whether it is unclean hands or not, under the law of repudiation, as set forth in our Civil Code and as set forth in a very comprehensive opinion in the United States District Court

of Appeals for the Seventh Circuit, which is quoted from in this second brief of ours beginning at page 5, the failure on the part of Robert Cummings to retract his repudiation made it impossible for him to terminate the contract or to get any relief. That is what the authorities hold.

Now, your Honor, I could take more time and I could go into matters which are discussed in the brief that I first filed, that is to say, the brief in support of the objections to the findings, but it isn't necessary to elaborate those things. My purpose here has been merely to draw the briefs together, to attempt to state the points clearly and to cite authorities which are in response to any points made by plaintiff in plaintiff's second brief. Of course, there is a multiplicity of briefs here which may lead to a confusion of counts, rather than a clarification of it. But our position in the matter is this, your Honor: The complaint obviously does not state a cause of action in either the first or second counts, because of the failure of [20] material allegations, the allegations of performance or excusable performance. No effort has been made to meet that, except to claim that the motion is not in time; and I have shown that it is in time, because the case is still in the bosom of the court and is still on trial. The only other effort to meet it has been to invoke procedural points in giving them all the better of it. That certainly can't discredit the motion, if their evidence shows the same omission and the same defects that the complaint shows. The only point they have attempted to make is that using general language, that the conduct and the notice that Oscar gave was not unequivocal. Well, as Justice Holmes, in an oft-quoted metaphor said, "General propositions do not decide concrete cases," and we have referred to the concrete cases that show that an attempt to impose conditions

which are not in the contract, such as a notice by a contracting party that he will not go ahead, except upon conditions which he does not have a right to impose, constitutes a repudiation. In addition to that, we have the point, which hasn't even been hinted at by counsel in any brief that they have filed, since the point was made by me and not previously made by Mr. Cooper in the trial, that the plaintiff was the first party to breach the contract, and having breached the contract and also repudiated it, and not retracted it, he can't come into a court, particularly a court of equity, and ask for relief [21] that will terminate a contract.

Now your Honor, admittedly I have extended myself in an endeavor to bring this matter appropriately before the court, because the case is one of extraordinary importance. It is important as far as the relations of Robert Cummings are concerned. It appears by reasonable inference from the facts, from the terms of the contract and the option, that Robert Cummings was an untried man when Universal took him on; that he developed and became a star. He may not have been a star of the first water; I am not competent to testify to that; but at any rate he was sufficiently a star that officers of the defendant offered to settle the case by suggesting that they call a picture contract, which is the kind of a contract that the biggest stars get. Now, after having built up Robert Cummings, after having spent doubtless hundreds and thousands of dollars, and maybe more in the development of him, it is not right that he should be permitted to come in and repudiate his contract. The sanctity of a contract means something; it should mean something to him; but the case is more important than that, because not only Universal, but the whole picture industry is based upon

these contracts, because they can't operate without these contracts of personal service. If these stars or people who are developing into stars are permitted to repudiate contracts under these conditions, and those repudiations are sanctioned by the courts, there can't be any [22] discipline in the relationship of master and servant and the picture industry can't function. That may seem like an argument of convenience, and in a sense it is. Of course, I am not suggesting that your Honor determine the case on anything except the law and the evidence, but it is, I think, proper for me to advert to the tremendous importance of the case, not only in this personal relationship, but to the defendant in the operation of its business. They operated for 25 years without Cummings, and while they are entitled to Cummings' service on the contract that they have, they probably could get along without him. But the case is more than that. They can't function if, on this sort of evidence, an actor can breach and repudiate a contract and then terminate it. And I make that point with all the earnestness I can, because I know that your Honor gave this case very careful and very laborious consideration and study. I wouldn't ask a court to go over a case and consider points that hadn't been previously stressed, although they stand out in the record, but I think it is only fair to the court and fair to the parties that these points be made with all the earnestness that I have. I hope your Honor will go into these briefs, as I know you will, and give the matter the consideration that it merits, for the reason that I would like to bring to your Honor's attention now, if you haven't read the briefs in full, and the reason is stated by Sir Frederick Pollock in an article in the Encyclopedia [23] Britannica on "Contract." I might say I read that article 30 years ago. I have been waiting 30 years to in-

sert it in a brief and this is the first opportunity I have had, and I think it is just "pat." That is the reason I have inserted it.

"Enforcement of good faith in matters of bargain and promise is among the most important functions of legal justice. It might not be too much to say that, next after keeping the peace and securing property against violence and fraud so that business may be possible, it is the most important."

I thank your Honor for your careful consideration and I submit the matter on the briefs on file, on the record before the court, and on the argument now made to your Honor.

Mr. Roth: May it please the court, I don't know whether Mr. Lewinson's reference to his oft-reiterated quotation from the Georgia case is made with calculation, that is, that the driver was drunk but the carriage reached home, but in view of his outstanding criticism of the pleadings in this case and the evidence, and what has been thus far the decision of the court, and his self-confessed conclusion that he is very much impressed with the soundness of his criticism and his position, I find myself in the position of a man who feels perfectly well, but as he walks along the street all his friends tell him he doesn't look so well and he begins to wonder whether or not he is sick. I refuse to [24] believe I am sick just because Mr. Lewinson says so. Mr. Lewinson has sort of brushed off his motion for judgment on the pleadings as addressed to the fourth cause of action, and while doing so says that the plaintiff hasn't paid much attention to it and sort of concedes it. Well, of course, we don't concede anything of the kind. We do concede that the principle upon which it

is apparently predicated, that is, that a written contract can't be modified by parol unless the parol is executed, is a sound principle, but we are not aware that our fourth cause of action is based upon any attempt to modify a written contract. Our fourth cause of action is based upon the proposition that the contract can't give Universal any greater rights than the right to reasonably require Robert Cummings to perform certain services. The contract itself in certain parts of it says so in so many words, and there is good law to that effect. In other words, if a man is an adult leading person, Universal, we contend, couldn't insist that he play the role of a juvenile, and if he is a tragedian of standing and Universal planned for him the role of a comic, we insist Universal couldn't enforce him to play the role of a comic. Furthermore, a motion for judgment on the pleadings is nothing more than a general demurrer. And the court will recall that our fourth cause of action, which has by reference made the entire first cause of action a part of the fourth cause of action, then goes on to allege a construction [25] of the contract and the fact that the officials of Universal agreed with Robert Cummings on what was a proper construction of the contract, and when he told them that it wasn't proper for them to require him to play a certain role in the picture "Fired Wife" with a certain director and with a certain cast, that he was within his rights, that is, his contractual rights, and when they told him that since he was within his contractual rights and they would furnish a certain kind of director and a certain kind of cast, that he was ready to perform.

Now, further, on that fourth cause of action this court has spent a great deal of time, and so have counsel. Counsel have been in this court on at least three separate occasions, going to great pains to settle the issues in this

case. The first occasion was when the plaintiff made a motion for summary judgment; the defendant countered with a motion for injunction. At that time we had an extended discussion, the contract was analyzed in detail by the court, was argued and discussed by counsel, and it was practically agreed in open court at that time there was one default being complained of, that is, that the plaintiff refused to play the role of "Hank" in "Fired Wife." A few weeks later the defendant came into court and made a motion to amend its pleadings. At that time there was an extended discussion as to what the issues in this case were and the issues were more or less fixed. The court made certain observa- [26] tions in respect of proposing amendments. At that time one amendment was permitted to be filed by stipulation, to-wit, the amendment which said something about the telegram of April 10th and which brought in another defense, that is, that the plaintiff was being required to do something other than perform the role of "Hank" in "Fired Wife," that he was also being required to perform other services on or about April 10th or April 12th, whichever the date happened to be. And at that time the permissibility of filing a second amendment was argued and discussed, and that second amendment was this plea of estoppel, that is, that plaintiff had stated to the defendant, or its servants or officers, that he was going to engage in flying and was going to join the Civil Air Patrol for the duration of the war. That amendment was permitted and was filed later; so we had another issue in the case.

Then at the time of trial the court, at the outset of the trial, stated what the issues were, counsel agreed with the court, and the court made some remark to the effect that it was clear to this court that counsel were getting at the

heart of the case. The case went to trial. During the period of trial some other issues were evolved; one about unavailability; another one about the fact that the defendant was lulled into a sense of security, which was a sort of offshoot of that issue of estoppel. And the court will also remember that at the outset of the trial it was stated, and [27] this specifically with respect to the fourth cause of action, by myself, I think, and Mr. Cooper agreeing, that we had had certain conversations prior to the time of trial to the effect that we would not try the fourth cause of action—the third having already been dismissed—because if the case were decided for the plaintiff upon the first cause of action it would be decisive of the entire litigation. Therefore, the fourth cause of action was held in abeyance, and that is the status now. Until this judgment is signed and until it is filed, this fourth cause of action is in abeyance. If, for any reason, this judgment is not sustained or if no judgment is entered, we feel we are in a position to go ahead to try our fourth cause of action. The fourth cause of action is one on what this contract means and what the rights of the plaintiff are in respect to it.

Now, in the fourth cause of action there is an allegation—it is true there isn't in the first cause of action—but in the fourth cause of action there is an allegation to the effect that plaintiff performed all the things he was required to do and perform under the contract. And we also have a stipulation of facts, and that stipulation says in effect that all the matters which are admitted in the fourth cause of action shall be deemed to be admitted for the purposes of all causes of action. There is no specific denial of that allegation in the fourth cause of action. [28] So for all practical purposes the effect is that the first

cause of action is cured by stipulation, if it needs any curing. We went to trial on certain settled issues, and if I may be permitted to use the expression, the guts of the entire argument of the defendant now, as set forth in its objections to the findings, as set forth in its motion to dismiss and as set forth in its motion for judgment on the pleadings, is crystallized in a finding which it requests the court to make. It asks the court to amend its findings by adding a new finding to this effect: That the plaintiff, at the time he was asked to play the role of "Hank" in "Fired Wife," then and there stated that he would not perform any of his obligations under such contract and that he then and there or thereby repudiated the contract. That, I think, is the substance of the language. Of course, that is not the testimony. It isn't even an inference from the testimony which the defendant excerpted in its memorandum in support of its objections to the findings. Robert Speers was on the witness stand and testified for some 48 pages of reporter's transcript. Ed Muhl testified at great length. But the only person who had any outstanding conversation with Robert Cummings, was Robert Speers, in respect of how Robert Cummings looked upon this contract. And the record shows that their first conversation was of approximately three hours in duration. During that three-hour conversation they spoke [29] of many things, but principally about the contract. That three-hour conversation was followed by a telephone conversation in which Robert Cummings and Robert Speers extended their remarks. Now, I challenge Mr. Lewinson, I challenge any impersonal party to read the record—

Mr. Lewinson: You mean impartial party, don't you?

Mr. Roth: Pardon?

Mr. Lewinson: You mean impartial party, don't you? I don't want to be compared to an impersonal party.

Mr. Roth: I wasn't comparing you. I think the phrase "impersonal party" is satisfactory, but I will accept your remark and make it impersonal and impartial, if that is in accord. But if the testimony of Robert Speers is analyzed impersonally there is nothing in that testimony which could sustain an inference that Robert Cummings at any time said that he wasn't going to perform the contract or that he was through with the contract. All Robert Cummings ever said, all Speers ever said he ever said, was that he wasn't going to perform the role of "Hank" in that picture. Throughout the whole testimony of Robert Speers the reference is to a certain picture, to-wit, the picture "Fired Wife."

Now, we admit that we didn't play that role, and when we refused to play it it is true the defendant had certain rights. Now, if it had no contract such as is in evidence here as a part of the complaint, it would have, as a matter of law, the right to say, "It is an anticipatory [30] breach. We can rescind or we can sue for damages," or it could have waited for the actual breach and said, "We have our remedies. We can rescind or we can sue for damages." But the defendant has had a lot of experience in this business and it had a great deal of contact with actors and other personnel engaged in the motion picture business, and they weren't satisfied with the rights or the remedies which the law gave them. They wanted something in addition to that. They wanted to supplement their legal rights, and being advised by counsel of experience they evolved a form of contract in which form they gave themselves these additional rights, namely, they don't have to terminate and they don't have to sue for damages:

they can go on with the contract: they can make certain elections under the contract. And in this particular case they elected to go on with the contract. They elected to suspend the plaintiff, that is, to suspend his compensation, and thereafter to extend the term of the contract for the duration of the suspension. So the contract was actually in full force and effect from the time Robert Cummings and Robert Speers first had their conversation with respect to Cummings playing the part of "Hank" in the picture "Fired Wife" to the day of the breach by Cummings and on the day of the breach and after the day of the breach, all the way on through until May 29th, when Robert Cummings took upon himself to terminate the contract, because the defendant had refused to pay him his compensation. [31]

Now, Mr. Lewinson would have the plaintiff come in and retract his repudiation. How could he retract his repudiation? The contract itself provides that he couldn't. If he had come in the next day, the defendant would have told him that it didn't need his services; that he couldn't put himself back on the payroll in that manner. That was the whole purpose of this particular suspension and extension. When once he was suspended they did not want Mr. Robert Cummings to come back the next day and say, "I am now ready to do the work," because meanwhile they had selected a substitute to do the particular job, and they didn't want Mr. Robert Cummings to have the right to put himself back on the payroll.

Now, there was certainly no repudiation in the fact that Robert Cummings said, or is alleged to have said by Mr. Speers, that he was going to join the Civil Air Patrol for the duration of the war. The record shows that the defendant never accepted that statement as a repudiation or even as a breach. As a matter of fact, they plead in

the second amendment to their answer that they would have respected and did respect his desire to enter the armed forces of his country and they would have assisted him in getting any sort of position or opportunity to serve his country.

So Universal never looked upon that statement as any sort of breach of his obligations. As a matter of fact, [32] the court will undoubtedly recall the testimony to the effect that Mr. Speers and Mr. Cummings had a conversation on the subject of whether or not it was Robert Cummings' duty to do something because the country was at war. There was some conversation about the Hollywood Victory Committee, and Speers was attempting to convince Robert Cummings that his activities in the Hollywood Victory Committee and his activities with the Civil Air Patrol were sufficient, and that he was performing a real service when he played a part in pictures.

We respectfully submit that counsel can't try this case in a vacuum. He just can't sit off and analyze a group of pleadings and say that the first cause of action doesn't say that this man offered to perform, when the issues in that particular case have already been settled, when the witnesses have been heard and when there is nothing, as a matter of fact, to allege. The only things in the contract that we could make any allegation about are about the negative covenants. There is a clause in the contract, a paragraph in the contract we call the morals clause, which is to the effect that the party must so conduct himself that his conduct is not offensive to public morals. It is true we might have alleged a negative compliance with this covenant, and we didn't. On the other hand, defendant's answer sets forth that we were in default. The issue was tried. Evidence was had upon the subject.

And in [33] spite of Mr. Lewinson's statement to the effect that we can't now stultify ourselves by asking for an amendment, which is more of a hope than a fact—we could, but I don't feel that there is any need to even ask for an amendment to conform to the proof in this case, because the proof shows that from about the 12th day of April up until the 29th of May no demand of any kind, written or oral, was made upon Robert Cummings in this case by the defendant. The court will recall that it went to great pains and made a thorough analysis of this contract at the very first hearing, and that analysis was supplemented as the trial went on; and the court came to the conclusion and asserted that it was a contract which required the plaintiff to do nothing except respond to the requests and follow the notices of the defendant. No such notice was given. That is very clear from the evidence.

Counsel has made what he says is a very sincere plea, in his opening remarks, to the effect that this is a very important case because it involves the sanctity of contracts. We have no desire to violate that principle in any respect. We agree that the sanctity of contracts should be upheld and that no relations in commercial life can be had unless contracts are enforced. This contract was made and written by the defendant. It has thousands of words in it, so as to protect the rights of the defendant. The only right the plaintiff has under the whole contract is his right [34] to collect compensation. And we agree that that contract should be enforced. The defendant didn't pay that compensation; it made all the moves here;

and it elected to give the plaintiff in the case a very clear opportunity to terminate his relations with them. We respectfully submit that the findings of the court as recommended in its memorandum decision are borne out in every respect by the record here, that they should be followed, that the findings of fact and judgment should be signed and the motions denied.

Mr. Lewinson: I have only a very few words to say in reply. Counsel has laid stress on the motion for judgment on the pleadings. Your Honor will find, upon reading the fourth cause of action, that an effort is made to modify the contract by an unexecuted patrol agreement, that that's all there is to it. There is no use of me stressing that, because that arises from an examination of the pleadings and from an examination of the authorities which we have cited, which are conceded by counsel.

One other observation: Counsel wants to know how Mr. Cummings could retract his repudiation. That isn't the position counsel took in the trial. At the trial of the case counsel took the position that Mr. Cummings didn't have to retract his repudiation; he didn't have to go with his hat in his hand and tell the people at Universal that he was ready to go back to work; on the contrary, they had to seek [35] him.

Mr. Roth: That is still my position.

Mr. Lewinson: That may still be your position, but that isn't the way you stated it in your argument. You asked, "How could he retract his repudiation?" You said, "If he had retracted his repudiation Universal would

have told him they didn't want him to go back to work." The evidence doesn't bear that out, your Honor. In the first place, there was no retraction, so there is no evidence that Universal would not take him back. But, on the contrary, there is substantial evidence in the form of two writings, which were the notices of suspension, that Robert Cummings was suspended until he reported for work. That is almost the identical language. So counsel is definitely repudiated on that by the record. It not only was possible for Robert Cummings to retract, it was his duty to retract. I see nothing else in the argument of counsel which calls for comment, your Honor, and I submit the matter.

The Court: I am trying to find a reference to one of the statements made, I believe, during the argument at the close of the evidence.

Mr. Lewinson: I don't know that there were any concessions by counsel who presented the matter to the court—I refer to counsel for defendant—which are inconsistent with any position I have taken, but inasmuch as the case is still on trial, if there are any inconsistencies in the [36] statements then made, I think they are not binding upon the defendant, and if they are, we would ask to be relieved from them.

The Court: Just let me have your indulgence a moment.

Mr. Lewinson: Certainly, your Honor.

The Court: Yes. I am looking now at page 44 of the court's memorandum.

Mr. Lewinson: May we locate it, your Honor, in our file?

The Court: Yes.

Mr. Lewinson: The page again, your Honor?

The Court: 44.

Mr. Lewinson: Yes, your Honor.

The Court: What is probably line 11: "In the course of the oral argument at the close of the trial defense counsel stated: 'Now there is of course a very decided conflict in the evidence with respect to what was said both on April 3rd and April 5th. The plaintiff denies that he said he was going into the Civil Air Patrol, or the army, for the duration on April 3rd. I think that is the only real controversy with respect to that conversation. Generally speaking, the parties, that is Bob Speers and Bob Cummings, agreed on the general substance of that conversation. Then we come, of course, to the more important conversation of April 5th on the telephone. In that [37] respect, Bob Speers, refreshing his recollection from the memorandum made three months later, said that the following Monday he had a telephone conversation with Robert Cummings in which he stated that he had made up his mind not to do the picture because he felt that it was his duty to give one hundred per cent of his time to war work and therefore was signing up with the Civil Air Patrol for the duration. Here again we have a direct conflict in the evidence. To my mind, the credibility of Bob Speers is an important issue in the case because everything flows from that conversation of April

5th. If Robert Cummings didn't make that statement our affirmative defense of estoppel goes right out of the window.' "

My idea in calling attention to this is to ask counsel now arguing the motions as to what meaning you make of that statement.

Mr. Lewinson: That last sentence, I think, is ill-advised, to say the least, and should be withdrawn, and is hereby withdrawn.

The Court: You don't think it was a sound statement on the evidence and on the law?

Mr. Lewinson: Certainly not, your Honor. No; it certainly wasn't.

The Court: To make my point clear, I recognize that counsel should not, as it were, be foreclosed from asserting what is the law or what is the final conclusion to be drawn [38] from the evidence, but what I had in mind in calling this to the attention of counsel this morning is that it purports to state a position—

Mr. Lewinson: Well, the position is not well taken. It concedes too much, and I can see where it very well might have misled the court. The rest of the statement, if I may put it in this cold and not too complimentary way, isn't half bad. It isn't too accurate, but the fact is, your Honor, as I indicated in my opening argument, Bob Speers and Muhl, and the memoranda that they offered in support of their position, did stress the matter of the Civil Air Patrol. That is a thing that stuck out in their minds. I emphasized that this morning. There is a good deal in

the testimony of Robert Cummings which explains that, because he said over and over again that he was going into the Civil Air Patrol and he said, also, that he couldn't play "Hank" for that reason. He put a sort of saving clause on the matter. But the point of the matter is this: The whole question here is on a different phase of the case. Did Robert Cummings in effect give notice that he wasn't going on with the contract according to its terms? Whether it took the form of a statement that he was going into the Civil Air Patrol or the form that he didn't like the director and wouldn't play under that director, or he didn't like his associates or didn't like money-making pictures, or various other reasons, is immaterial. The ultimate fact is, [39] did he renounce and repudiate the contract? I think his own evidence and the evidence of his agent, disregarding entirely the version of the conversation given by Speers and Muhl, shows that he did repudiate the contract.

I am glad your Honor brought this matter up, because I think it was impliedly withdrawn by the position that I took; now it is expressly withdrawn.

The Court: I think I should have the benefit of the transcript of your argument.

Mr. Lewinson: We are delighted to furnish it to your Honor.

The Court: Very well. The motions will be marked submitted.

[Endorsed]: Filed Dec. 15, 1944. [40]

[Endorsed]: No. 10954. United States Circuit Court of Appeals for the Ninth Circuit. Universal Pictures Company, Inc., a corporation, Appellant, vs. Robert Cummings, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 22, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals,
for the Ninth Circuit.

Appeal No. 10954

(Civil Action No. 3242-H. District Court, Southern
District of California, Central Division.)

Universal Pictures Company, Inc., a Corporation,
Defendant and Appellant,

vs.

Robert Cummings,

Plaintiff and Appellee.

APPELLANT'S STATEMENT OF POINTS ON
APPEAL.

In accordance with Rule 75(d) of the Rules of Civil Procedure, appellant, Universal Pictures Company, Inc., hereby makes its statement of points on which it intends to rely on appeal, as follows:

1. The Court clearly erred in denying appellant's motion to dismiss appellee's complaint, as well as in denying appellant's motion for judgment on the pleadings.

2. Appellee's complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or entitle him to relief.

3. Appellee failed to plead or prove that he had performed, or was ready, or willing, or able, to perform, the obligations on his part to be performed under the contract referred to in his complaint, and failed to plead or prove that he had any valid excuse for nonperformance.

4. It appeared by the clear weight of the evidence that prior to the alleged breach of the contract by appel-

lant, appellee had breached the contract and appellee was in default under the terms of the contract at the time of bringing the action, and had not at any time cured said default.

5. Appellee failed to prove that appellant's breach, if any, was a material breach of the contract; and it appeared from the clear weight of the evidence that appellant's breach, if any, was an immaterial breach and the equities were in appellant's favor.

6. It appeared from the clear weight of the evidence that appellee, prior to the alleged breach of contract by appellant, had repudiated the contract, and had never retracted such repudiation.

7. The findings, as well as the judgment, are clearly erroneous in that:

(a) The Court clearly erred in denying appellant's motion to dismiss appellee's complaint, as well as in denying appellant's motion for judgment on the pleadings.

(b) Appellee's complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or entitle him to relief.

(c) Appellee failed to plead or prove that he had performed, or was ready, willing, or able, to perform, the obligations on his part to be performed under the contract referred to in his complaint, and failed to plead or prove that he had any valid excuse for nonperformance.

(d) It appeared from the clear weight of the evidence that appellee had committed the first breach of the contract, and that prior to the bringing of the action appellee was in default under the terms of said contract, and had not at any time cured said default.

(e) Appellee failed to prove that appellant's breach, if any, was a material breach of the contract; and it appeared from the clear weight of the evidence that appellant's breach, if any, was an immaterial breach and the equities were in appellant's favor.

(f) It appeared from the clear weight of the evidence that appellee, prior to the alleged breach of the contract by appellant, had repudiated the contract, and had never retracted such repudiation.

(g) The termination of the contract referred to in appellee's complaint is against the clear weight of the evidence.

(h) The clear weight of the evidence shows that appellant did not breach, or threaten to breach, any of the promises or conditions to be performed by it under the contract.

(i) The clear weight of the evidence shows that appellee had not performed, nor was ready, nor was willing, nor was able, to perform, the obligations on his part to be performed under the contract referred to in his complaint, nor had any valid excuse for non-performance.

(j) The clear weight of the evidence shows that appellant did not waive any of its rights under said contract.

8. The Court's Findings of Fact are insufficient to support the judgment.

9. The Court's judgment is contrary to law.

10. The Court clearly erred in denying appellant's motion for a new trial.

Dated December 19, 1944.

LOEB & LOEB
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Service acknowledged December 19, 1944.

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[Endorsed]: Filed Dec. 22, 1944. Paul P. O'Brien,
Clerk.

